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Supreme Court U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1846

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY;
AND THE STATE OF NEW HAMPSHIRE,
Appellants

v.

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR
OF THE UNITED STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,
Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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May 20, 1980

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Statutes:

The statutes listed under "Statutes Involved", infra, are cited passim.

In The
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THE STATE OF NEW HAMPSHIRE,
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THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR
OF THE UNITED STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,
Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

The State of New Hampshire, and the New Hampshire Department of Employment Security, Appellants, appeal from the final judgment of the United States Court of Appeals for the First Circuit, dated February 20, 1980, holding that the New Hampshire Unemployment Compensation Law, Revised Statutes Annotated (RSA) 282,

is contrary to federal law, as expressed in the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §3301-3311, and holding further that the 1976 Amendments to FUTA, imposing certain mandatory coverage requirements upon states as a condition of retaining certification under 26 U.S.C. §3304 (c), are constitutional.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, which appears in the appendix hereto, is reported at 616 F. 2d 240 (February 20, 1980).

The Order of the Secretary of Labor, dated October 30, 1978, is not reported, and is reproduced in the appendix hereto.

JURISDICTION

The proceeding below was one seeking review pursuant to 26 U.S.C. §3310 of an order of the Secretary of Labor adverse to the State and citizens of New Hampshire within the meaning of 26 U.S.C. §3304 (c), and asserting that the provisions of the federal law relied upon

by the Secretary are repugnant to the Constitution of the United States, and therefore void. The court below affirmed the Secretary's finding of repugnance of New Hampshire law to federal statutes, and held those federal statutes to be constitutional.

The date of entry of the decision below is February 20, 1980. Notice of appeal shall have been filed, contemporaneously with this Jurisdictional Statement, in the Court of Appeals for the First Circuit. This Statement is being docketed within ninety days from the date of decision below. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (2).

Appellants believe that there are no cases bearing directly upon the matter of this Court's jurisdiction on appeal in such a case, as this is believed to be the first instance of review by a Court of Appeals of an Order of the Secretary of Labor pursuant to 26 U.S.C. §3310. Cf. Opinion below, n.1.

STATUTES INVOLVED

The statutes involved are of sufficient number and length to preclude verbatim recitation here; accordingly they are cited below, and reproduced at length in the Appendix hereto.

UNITED STATES CONSTITUTION

Amendment V: No person shall...be deprived of life, liberty, or property without due process of law;...

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES

The following provisions of federal law are involved in the issues raised by this appeal:

26 U.S.C. §3301
26 U.S.C §3302
26 U.S.C. §3304
26 U.S.C. §3306
26 U.S.C. §3309
26 U.S.C. §3310

Of the provisions so involved, the constitutional challenge by Appellants herein focuses upon §3304 (a) (b) (A), by the operation of which the unconstitutional result is reached. Also challenged is the operation of §3302 (a) (1) in a geographically non-uniform manner upon the occasion of an action by the Secretary under §3304 (c).

STATE STATUTES

This appeal involves, in the broadest sense, the entire New Hampshire Unemployment Compensation Law, Revised Statutes Annotated (RSA) 282. The portions of that law specifically involved in this matter are the following:

RSA 282:1-H (4) (g)
RSA 282:1-H (4) (q)
RSA 282:1-H (4) (r)
RSA 282:1-H (4) (s)
RSA 282:1-N (1) (a)
RSA 282:1-O

QUESTIONS PRESENTED

This appeal presents, in its broadest perspective, the question whether the provisions of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 State. 2667 (as amended by Pub. L. No. 95-19, 91 Stat. 39) (the "1976 Amendments") and the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (the "1970 Amendments") [1/] to the Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq. ("FUTA"), which require the State of New Hampshire and its local governments to finance unemployment compensation coverage for their own employees, unconstitutional and unenforceable by the Secretary of Labor ("the Secretary") against the New Hampshire Department of Employment Security (NHDES) and the State of New Hampshire.

1/ New Hampshire is in conformance with the 1970 Amendments. The constitutional predicate of these Amendments is the same as that of the 1976 Amendments.

The subsidiary issues raised in turn by that question are discussed herein under "the Questions Are Substantial", infra.

Inherent, as well, in this appeal is the question whether the process, both administrative and judicial, by which the principal issues are raised, litigated, and reviewed is consistent with accepted standards of due process of law.

STATEMENT OF THE CASE

The New Hampshire Department of Employment Security et al. ("NHDES") has petitioned (Petition filed December 28, 1978) this Court for judicial review pursuant to 26 U.S.C. §3310 of the Order of the Secretary, dated October 30, 1978, which concludes that New Hampshire's Unemployment Compensation Law ("NHUCL") failed to conform to certain requirements of the Federal Unemployment Tax Act, as amended, 26 U.S.C. §3301 et seq. ("FUTA"), principally those requiring State taxation of all local governments (and State agencies) in order to finance a

Federally required public sector program of unemployment benefits.

The challenged provisions employ sanctions for enforcement, not against these governments as employers, but against private sector employers in New Hampshire. The Congress was candid in admitting that it was setting requirements on State and local governments which were immune - of constitutional necessity - from the sanctions under the Federal tax power, U.S. Const. Art. I §8 cl. 1. Because of serious constitutional objections to the power of Congress thus to dictate the terms and conditions of State and local

government employment, New Hampshire has refused to conform to the coercive Federal mandate of the 1976 Amendments. 2/ The Supreme Court of the United States has held in National League of Cities v. Usery, 426 U.S. 833 (1976) the Federal government has no such power under the Constitution's Commerce Clause, and Respondents' reliance upon the tax power as a constitutional basis for the Amendments here challenged is rejected by National League, as that case is founded upon tax immunity decisions of the Supreme Court of the United States. New

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2/ In County of Los Angeles, California, et al. v. Marshall, et al. Civ. No. 77-2023 (D.D.C.), dismissed Mar. 7, 1978, appeal docketed Nos. 77-2138, 78-1232, etc. (D.C. Cir. Mar. 8, 1978, 7 States, including New Hampshire, and some 1750 local governments have sought to challenge the constitutionality of these same Federal requirements. But USDOL successfully argued there that the instant proceeding is the only appropriate means to secure judicial attention to these constitutional claims. The D.C. Circuit affirmed, March____, 1980, 416 F.2d.____.

Hampshire's refusal to submit to the unconstitutional requirement thus triggered the sanction, also unconstitutional, on its innocent private sector employers.

A. JURISDICTION OF THIS COURT, AND THE PROCEEDINGS BELOW

Pursuant to a Notice of Hearing issued by the Secretary on June 15, 1978 (43 Fed. Reg. 27500), a conformity hearing ("Conformity Proceeding") was held before an Administrative Law Judge of the Department of Labor on September 14-15, 1978, in Washington, D.C., 3/ on six numbered issues of the conformity of NHUCL with various Federal requirements of FUTA. 4/

3/ The parties below were: The State of New Hampshire, Department of Employment Security and the United States Department of Labor. Others participated as interested parties.

4/ Petitioners attempted unsuccessfully there to obtain a reviewable conclusion on the constitutionality vel non of the 1976 Amendments.

The Administrative Law Judge rendered his Recommended Decision on October 13, 1978, and in accordance with the Revised Rules of Procedure made both findings of fact and conclusions of Law on the six statutory issues. The Administrative Law Judge made only findings of fact on the constitutional law issues. The Recommended Decision of the Administrative Law Judge to the Secretary of Labor found the NHUCL not in conformance with Federal requirements of FUTA on each of the six issues specified in the Notice of Hearing.

On October 30, 1978, the Secretary issued his final Order, adopting verbatim as his own every modification to the Recommended Decision proposed by USDOL attorneys in their Statement of Exceptions.

The effect of the Order here on review is to impose on private employers in New Hampshire a $40 million penalty per year for the refusal of the State to tax, not them, but the local

governments of New Hampshire.

B. FUTA AND THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION PROGRAM

1. Symmetrical Private Sector Program

The basic structure of the private sector Federal-State Unemployment Compensation Program has remained unchanged from the enactment of the Social Security Act, c. 271, 49 Stat. 620, in 1935. Title IX of that Act imposed on private sector employers a Federal payroll tax of 3.0% (on the first $3000 of each employee's salary), but allowed a credit of up to 90% of this amount (2.7%) for contributions paid by such employers into a State unemployment compensation fund under a State unemployment compensation law which met various conditions for Federal approval set out in Title IX. The reality is that the full FUTA tax (3.0% originally, now 3.4% of the first $6000 of salary) never has been imposed. In operation, the tax is 0.7% (originally 0.3%), with the 2.7% credit acting - by the threat of its withdrawal - as a

sanction to insure that State laws conform to changing Federal requirements. In addition, Federally approved state programs were eligible for Federal grants to the States to pay the costs of administering their unemployment compensation programs.

New Hampshire's private sector unemployment compensation program has since the original Federal Act, been enacted and amended to conform to changing Federal standards. 5/ New Hampshire's

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5/ The 1976 Federal Amendments, Pub. L. No. 94-566, required several technical amendments in the private sector program; the principal requirement, however, was the public sector program. New Hampshire, as do all the States, routinely amends its law to conform to the entirety of new requiremnets of a particular Federal Amendment for the private sector program.

Therefore, New Hampshire, in refusing on constitutional grounds to impose the tax on its political subdivisions to finance a public sector program as required by Pub. L. No. 94-566, also failed to make the several technical private sector amendments. There is no hint in the New Hampshire legislative history - nor has US DOL suggested any below - of an unwillingness in New Hampshire to make these technical amendments.

private sector program is not in issue in this case, [6/] except insofar as private employers are held hostage to coerce adoption of the Federally mandated public sector program.

2. Asymmetrical Addition of Federally Required Public Sector Program

The change of the Federal Amendments whose constitutionality is the subject of this case was to break the symmetry of the 1935 Act's private sector program.

Originally, each (private sector) employer subject to the Federal requirement of State taxation was also subject to the Federal FUTA

6/ Nor does this case involve a challenge to perfectly rational conditions under 42 U.S.C. §503 placed on Federal administration grants to the States, principally for the administration of the private sector program.

tax. 7/ His was a sum certain in Federal and State taxes (3.0%): what was not paid to the State (under Federally approved laws) would be paid to the Federal government. In the private sector program, the private employer was not a hostage to insure State-law conformance to Federal requirements, and the State was not coerced into taking for its own administration 90% of the sum (3.0%) which would otherwise be given over entirely to Federal administration.

7/ For the first 37 years of the Federal-State program, no provision of the Federal statutes required the State laws to cover any specific class of employees in either the public or private sector. Instead, the imposition of the FUTA tax and allowance of offsetting credit induced State law coverage in the private sector which was generally as broad as that of the Federal tax, although the States retained the authority to adopt more restrictive coverage or expand coverage beyond the inducement provided by the Federal law.

Originally, State and local governments were subject neither to the Federal FUTA tax nor to the Federal requirements of a State tax. State legislatures were thus entirely free to experiment with varying degrees and terms of unemployment insurance coverage for employees of State and local governments. State legislatures could, and did, provide and withdraw such coverage as they deemed appropriate, and tailor such coverage to fiscal constraints and the realities of public employment as they perceived them.

However, in the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 697 ("1970 Amendments"), Congress for the first time added employee coverage requirements to the list of conditions for Federal approval of State unemployment compensation laws. The 1970 Amendments require the States to extend unemployment compensation coverage to public sector employees in State hospitals and institutions of higher education, and to give local governments the option of covering their own employees in-

stitutions run by them.

Moreover, Federal law requires regulatory provisions unrelated to benefit coverage; 26 U.S.C. §3304 (a) (5), the "labor standards clauses" discourage State and local government from maintaining policies which traditionally are regulated in labor-management relations statutes. State and local governments remain-on constitutional grounds-exempt from the National Labor Relations Act, 29, U.S.C. §151 et seq.

Now the 1976 Amendments require, with very limited exceptions, that all State and local government employees be covered by unemployment compensation and that their government employers finance the coverage by paying a State-law tax in the same manner as employers in private business and industry. 8/

8/ The only option given public sector employers is to reimburse for benefits actually paid rather than to pay a tax in anticipation of benefit payments. 26 U.S.C. §3309 (a) (2).

3. Sanction on Private Sector Employers to Enforce Public Sector Compliance

The failure of a State to amend its unemployment compensation law to provide the State and local government employee coverage required for conformance with the 1976 Federal Amendments results in "decertification" of the State's entire unemployment compensation program, public and private, and in the imposition of a 2.7% FUTA tax penalty (the loss of the FUTA tax credit) on the State's private sector employers. 26 U.S.C. §3304 (c). These private sector employers thus have to pay FUTA taxes at a rate five time grater than that imposed on private sector employers in conforming States (a FUTA tax increase from 0.7% to 3.4%). None of these FUTA tax revenues and penalties can be used in support of the nonconforming State's existing private sector unemployment compensation program. Thus, the entire private sector Federal payments - not merely the penalty - are to be diverted from New Hampshire to be used as the Secretary

of Labor desires in other States. The imposition of the FUTA tax penalty on the State's private sector employers is retroactive to the beginning of the applicable year, here 1978. The amount of this annual tax penalty on New Hampshire's private sector employers is conservatively estimated to be $40 million. 9/

C. COVERAGE OF STATE AND LOCAL GOVERNMENT EMPLOYEES UNDER EXISTING NEW HAMPSHIRE LAW IS RATIONAL AND COST-EFFECTIVE

Since 1957, the State of New Hampshire has provided full unemployment insurance coverage of its staff of permanent classified employees in its civil service; State employees not covered include temporary and seasonal workers, as well as those not in classified service. 10/

9/ This was not disputed on the administrative record below.

10/ "Temporary" positions are those "known to be of limited duration," while "seasonal" positions are those as to which the need "may be reasonable anticipated as likely to recur each year for a varying period of time." RSA §282.1(H) (4) (r).

New Hampshire's existing program of unemployment for State and local government employees is clearly rational and cost-effective. The program has not failed to meet the legitimate needs and expectations of such employees. Yet this program for State and local government - as well as the entirely independent program for private sector employees - is now threatened with extinction by USDOL's insistence that NHUCL does not satisfy the 1976 Amendments' requirements for full unemployment coverage and financing of unemployment benefits for State and local government employees.

D. THE RULING BELOW

The Court of Appeals for the First Circuit, after briefing and oral argument, entered its order and opinion on February 20, 1980, affirming the Order of the Secretary of Labor. This appeal follows.

THE QUESTIONS ARE SUBSTANTIAL

The issues raised by this appeal are substantial, and, in the main, are matters of first impression (Appendix, Opinion Below, Note 1, at p. 2). As with most cases in which state or federal laws of broad application are involved, the disposition of issues here presented determine the placement of financial and other burdens of great magnitude, and affect policy making functions in both business and government.

That much is true in New Hampshire alone, the source of this issue; necessarily, however, the same considerations have both application and substantial consequences in every state in the nation, since the federal law challenged is at

once national in scope and coercive of uniformity among state laws.

Considering the financial consequences of conformity, New Hampshire may be expected to present one of the smaller examples of the financial impact of the 1976 Amendments to the FUTA. The impact of non-conformity and loss of the 90% FUTA credit now available to private sector employers is another matter entirely, and involved, conservatively, $40 million in New Hampshire alone in 1978. The amount of money involved nationwide is necessarily staggering, and the identity of the classes or groups of persons or organizations bearing the financial burden of the 1976 Amendments varies dramatically according to the resolution of the issues raised herein.

THE PRINCIPLE INVOLVED

The consequences of a resolution of this case, whatever the outcome, reach far beyond the perimeter of New Hampshire as a locale, and of

unemployment relief programs generally. The principle at stake in this case is whether, or to what extent, the federal government can lawfully affect and control the internal governance, functions, and finances of state and local governments, by indirection, where the same effects and controls applied directly would be unconstitutional and void.

In the circumstances of this case, the question is thus posed, whether the federal taxing power may be used by Congress in the fashion approved with respect to unemployment programs in the private sector by this Court in Steward Machine Co. v. Davis, 301 U.S. 548 (1937), to accomplish (Appellants say "coerce") a result which is not within its power to compel directly upon a state government under this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976).

Just as Appellants here seek sincerely to convince this Court of the substantial import of

the issues presented (although New Hampshire may present a relatively samll instance of financial impact compared to a state such as New York or California), so, too, they urge that this Court appreciate what this case is not.

This case is not Steward Machine revisited. That case was, at bottom, a tax refund case, and the Court's focus was whether the tax levied, being rational and uniform on its face, became arbitrary and unconstitutional on account of its being linked to a national unemployment relief program held to be within the scope of congressional power as applied to the private sector of business and employment relationships.

This case, however, starts with the proposition that Congress may not control by direct legislation the employment terms and conditions of state and local governments under the holding in National League, and asserts that, if that holding is to have any lasting consequence to matters of state sovereignty and principles of

federalism, the proposition must also be established that Congress cannot compel, by threat of adverse tax consequences to unrelated (read: innocent) parties geographically classified by the boundaries of the state (or other jurisdiction) to be affected, that very same degree of regulation and usurpation of discretion prohibited to it when acting ex cathedra.

FREEDOM OF CHOICE

The standard defense to the position asserted by Appellants in this case is that the State is free to choose its course, and is not compelled, but only invited, to do the bidding of Congress. Steward Machine, id. Such would be the case if:

(1) State and local governments were a permissible object of federal regulation of employment practices; and

(2) State and local governments were taxpayers from whose tax burden the 90% credit could be granted to maintain the parity of burden present in the private sector system.

Instead, here, the contrary is true in both respects, the result being that, if the State conforms with the federal dictate, a direct and uncompensated charge upon the public fisc necessarily follows, contrary to the considered choice of the state absent the federal

mandate; if the state does not conform, the private sector business community, which already pays for its charges upon the unemployment compensation system, now pays a dramatically increased federal tax, solely as a consequence of the state's resisting an "invitation" to do what it does not wish, and cannot be compelled, to do. Either consequence, Appellants submit, is constitutionally fatal to the federal provisions creating such a "Hobson's choice".

The Steward Machine opinion did not decide the case now presented by this appeal, and, more precisely, reserved consideration of such issues to a more appropriate controversy.

"In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such

question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function."

Steward Machine Co. v. Davis
Id. at 590

Indeed, Mr. Justice Cardozo's opinion infers that the imposition of "a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national", is defective on that account. Id., at 591. This case is not a matter where "the tax and the alternative (are) approximate equivalents".

TAX OR CREDIT UPON THE TAX

A further development in the law germane to this case serves to reinforce the position of Appellants here. The Steward Machine suggests that a tax, once laid on with geographical uniformity, does not become infirm because a credit upon it may be conditioned to have effect,

or to lose its effect, in a particular geographical location, ie., a state. Appellants submit, with some keenness of feeling, that that proposition, if ever viable, did not survive the holding of this Court in Austin v. New Hampshire, 420 U.S. 656 (1975). There, a tax uniformly laid, but with credits based upon geographical determinants, was held defective. That case established the principle that the practical impact, not the pristine technical features, of a tax are the measure of its basis for constitutional scrutiny. Here, should the operation of the federal provisions challenged go so far as to alter the credit status under the FUTA of New Hampshire residents alone, then such necessarily non-uniform taxation will have been established solely upon what Congress cannot compel directly. That, by any previous analysis of which Appellants are aware, is not a rational basis to sustain a tax measure which is, or on such occasion becomes, non-uniform and

discriminatory..

Austin v. New Hampshire
supra

THE ADMINISTRATIVE AND JUDICIAL REVIEW

Appellants call the Court's attention to the provisions of 26 U.S.C. §3304 (c) and §3310. The federal provisions call only for notice and opportunity for hearing when a state's laws are to be challenged by the Secretary of Labor. Yet the procedure applied is not the conventional administrative review in which the case arises from the lowest ranks of the agency and proceeds up through a conventional review procedure, and ultimately to the judicial system.

Here, the Secretary of Labor is the plaintiff, and has at the outset made a determination of non-conformity when a Notice of Hearing is published. Since the Administrative Law Judge (however impartial) has authority only to recommend a decision, and the final determination is made by the

same Secretary of Labor who commenced the proceeding, to expect the outcome to be otherwise than the beginning is unrealistic in the extreme. The process itself brings the accused before a bench occupied, in the end, by the accuser, and is, on that account alone, barren of fundamental due process and unconstitutional.

CONCLUSION

For the reasons set forth above, Appellants respectfully urge that this Court note probable jurisdiction of this appeal, so that the issues raised herein may have the thorough briefing and plenary consideration which Appellants sincerely believe that the deserve.

Respectfully submitted,

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May 20, 1980

UNITED STATES DISTRICT COURT FOR THE COURT OF APPEALS FOR THE FIRST CIRCUIT

THE STATE OF NEW HAMPSHIRE, DEPARTMENT OF EMPLOYMENT SECURITY, AND THE STATE OF NEW HAMPSHIRE,
Appellants

v.

Civil Action No. 78-1564

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES; AND THE UNITED STATES DEPARTMENT OF LABOR,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The State of New Hampshire, Department of Employment Security; and The State of New Hampshire, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on February 20, 1980.

This appeal is taken pursuant to 28 U.S.C. §1254.

The State of New Hampshire
Gregory H. Smith, Acting Attorney General, By
James E. Morris,
Assistant Attorney General

/s/ James E. Morris

The State of New Hampshire, Department of Employment Security
Edward F. Smith
General Counsel

/s/ Edward F. Smith

Concord, New Hampshire
May 20, 1980

I certify that a copy of the foregoing was sent by first-class, postage paid mail to the following:

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Edward F. Smith, General Counsel

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1846

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY;
AND THE STATE OF NEW HAMPSHIRE,
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v.

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR
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ON APPEAL FROM THE UNITED STATES
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APPENDIX TO JURISDICTIONAL STATEMENT

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May 20, 1980

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 78-1564

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

PETITIONERS,

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES, AND THE UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

ON PETITION FOR REVIEW OF THE DECISION OF THE SECRETARY OF LABOR OF THE UNITED STATES

Before

CAMPBELL and BOWNES, *Circuit Judges*,
DEVINE, *District Judge*.*

Charles S. Rhyne and *James E. Morris*, with whom *Edward F. Smith*, General Counsel, *Paul V. Kenneally*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne & Rhyne*, were on brief, for petitioners.

Robert T. Duffy, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews* and *Leonard J. Henzke, Jr.*, Attorneys, Tax Division, Department of Justice, were on brief, for respondents.

George Kaufmann, with whom *Zwerdling and Maurer*, *A.L. Zwerdling*, *Janet Kohn*, *Leonard Lesser*, *J. Albert Woll*, General Counsel, AFL-CIO, *Laurence Gold*, Special Counsel, AFL-CIO, and *Edward J. Hickey*, General Counsel, Public Employee Dept., AFL-CIO, were on brief, for American Federation of Labor, et al., amici curiae.

Richard M. Flynn, *Charles S. Rhyne*, *William S. Rhyne*, *Martin W. Matzen*, *Stephen P. Elmendorf*, and *Rhyne and Rhyne*, on brief for Business and Industry Association of New Hampshire, et al., amici curiae.

*Of the District of New Hampshire, sitting by designation.

February 20, 1980

BOWNES, *Circuit Judge*. This is an appeal pursuant to 26 U.S.C. § 3310[1] of the decision of the Secretary of Labor that the New Hampshire Unemployment Compensation law fails to conform in six separate respects with the requirements of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311.

In order to understand the issues involved, some explanation of the unemployment compensation law is necessary. The law has its roots in the Great Depression when unemployment was so widespread that the separate states were unable to meet the basic needs of their citizens. Several states, of which Wisconsin was the leader and New Hampshire an early follower, enacted their own unemployment insurance programs. The financing for these programs was obtained mainly by a tax on private employers. Many states, however, refused to enact such programs fearing that the tax on local employers would cause them to flee to other states which did not have such a law. The federal unemployment insurance law was thus devised to meet a national problem. The constraints of federalism and the dictates of practical politics resulted in legislation designed to equalize the burden on the states with full participation by all. This was accomplished by the inducement of tax credits to private employers and outright grants made available to the states to help defray the administrative costs of the program. The tax on the private employer was levied and collected by the state. The moneys collected had to be promptly remitted by the states to the Secretary of the Treasury. A credit of up to 90% of the tax due was given the employer if he had made

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[1]We understand that this is the first appeal under 26 U.S.C. § 3310, which provides in pertinent part:

> (a) *In general.*— Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located of with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

contributions to his state's unemployment insurance fund. The tax credit and the grants were contingent on certification by the Secretary of Labor that the state had enacted an unemployment compensation program that conformed to federal statutory requirements.

There was no direct statutory command to the states requiring them to conform to federal law. The federal government made an offer to the states which they could accept or refuse. Up until now, all the states found the combination of tax credits to its private employers and outright grants in return for conforming legislation an offer that could not be refused.[2]

Although the Act has been extensively amended since its inception in 1935, the basic design and statutory machinery have remained constant. The present statutory machinery works as follows. Under 26 U.S.C. §§ 3301 and 3306(b)(1), private employers are taxed an amount equal to 3.4 percent of the first $6,000 in wages paid each employee. 26 U.S.C. § 3302(a)(1) allows a credit of up to 2.7 percent of such wages against the tax for the employer's contribution to an unemployment fund maintained under state law. But the employer can obtain this credit only if the state's unemployment law is certified by the Secretary of Labor as provided in 26 U.S.C. § 3304.

26 U.S.C. § 3304(a) requires that the Secretary of Labor approve any state unemployment compensation law that conforms to the federal requirements. Section 3304(b) requires the Secretary to notify the governor of the state of such approval, and section 3304(c) requires the Secretary to certify such approval to the Secretary of the Treasury. Failure to obtain certification means not only the loss of FUTA tax credits for private employers, but also the loss to noncertified states of two kinds of federal grants. One grant goes towards the cost of

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[2]For a full discussion of the genesis of the unemployment insurance program and its statutory mechanism, see *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), and *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

administering the state's unemployment compensation program. 42 U.S.C. §§ 501-503. The other goes towards the administration of public employment offices which provide for job-finding, employment recruiting and other services. 29 U.S.C. §§ 49-49n.

Coverage under the unemployment compensation law was modified, restricted and expanded in 1976 by amendments to FUTA. The changes that concern us are as follows.

1. Employees of a state and its political subdivisions were required to be covered. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(B), and 26 U.S.C. § 3306(c)(7).

2. Coverage was extended to the employees of nonprofit schools which are not institutions of higher learning. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(A), and 26 U.S.C. § 3306(c)(8).

3. Political subdivisions of a state were given the option of reimbursing the state for unemployment benefits paid to former employees in lieu of making payments in the same manner as private sector employees. 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2).

4. 26 U.S.C. § 3304(a)(14)(A), (B) and (C) restricted the coverage of aliens, requried uniform reporting of alien status data and imposed the preponderance of the evidence test for denying compensation based on alien status. Under 26 U.S.C. § 3304(a)(9)(A), denial of compensation to an alien from a country contiguous to the state of employment solely on the basis that he filed another claim in that country was forbidden.

5. Coverage afforded to professional athletes was restricted by prohibiting the payments of benefits between athletic seasons. 26 U.S.C. § 3304(a)(13).

6. The coverage of employees of educational institutions was modified in regard to the coverage of professional and non-professional employees between academic terms or years, and during vacation periods and vacation recesses. 26 U.S.C. § 3304(a)(6)(A).

This case was precipitated by the veto on June 23, 1978, by the then governor of New Hampshire, of a bill that was intended to bring the New Hampshire Unemployment Compensation law into conformity with the provisions of 26 U.S.C. § 3304. The state had amended its unemployment compensation law, effective January 1, 1978, in an effort to conform with the 1976 amendments. It was notified by the Secretary of Labor in February of 1978 that he had serious questions as to whether this law conformed with federal requirements. This led to the June, 1978, legislation, the veto of which was accepted by the legislature.

After the veto of the conformity legislation, a hearing pursuant to 26 U.S.C. § 3304(c), was scheduled by the Department of Labor on whether New Hampshire was in conformity in regard to the five categories of coverage and the optional payment provision for political subdivisions of the state. The hearing was held on September 14 and 15, 1978. In addition to the six conformity issues, New Hampshire challenged the constitutionality of the 1976 amendments as they related to coverage of the employees of a state and its political subdivision. Indeed, almost all of the evidence introduced by New Hampshire focused on the constitutional issue. The administrative law judge (ALJ) found that New Hampshire's unemployment law failed to conform with federal law in all six respects claimed by the Secretary. He made findings of fact as to the constitutional issue, but made no ruling thereon. In reviewing the opinion of the ALJ, the Secretary made additional findings, modified a conclusion of law, corrected some errors and then adopted the findings of facts and conclusions of law of the ALJ as his own.*

*On June 23, 1979, New Hampshire enacted House Bill 808 in an attempt to conform with the 1976 FUTA amendments. We asked for briefs on the question of whether this legislation rendered the case moot. The State of New Hampshire, in a brief by its Attorney General, urged that the case was moot. The other parties, the Department of Labor, the State of New Hampshire Department of Employment Security, and the Amicus took the position that the case was not moot.

The parties differ on the scope of our review. Petitioners focus on the constitutionality of the 1976 amendments while respondents assert that, if we uphold the findings of statutory violations, we need not and should not reach the constitutional issue. While the course suggested by respondents is tempting, we feel that we must decide both the conformity and constitutional issues.

The state did not meet the conformity requirements of 26 U.S.C. § 3304, nor does it so claim. As already noted, it introduced practically no evidence at the hearing on conformity and did not urge that it had complied with the law. New Hampshire's brief is devoted almost exclusively to the constitutional question. In fact, it admits nonconformity by stating, "New Hampshire has failed to satisfy the Secretary as to the requirements of the 1976 amendments, solely because of its

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Our examination of the bill and subsequent events convince us that the case is not moot. House Bill 808 did provide a framework for bringing New Hampshire into conformity with FUTA. The legislation alone, however, could not bring New Hampshire into full compliance. Conforming rules and regulations had to be promulgated by the New Hampshire Department of Employment Security to flesh out the bare bones legislation. These required the approval of the Secretary of Labor. In addition, administrative action by New Hampshire was necessary to give such rules and regulations retroactive effect. The parties attempted for months to agree on the rules and regulations and administrative action for implementing House Bill 808 and bringing New Hampshire into conformity with the FUTA amendments. The State of New Hampshire and the Department of Labor did agree on conforming rules and regulations and a judgment was prepared embodying them. The New Hampshire Department of Employment Security, however, refused to approve the judgment agreed upon by the Department of Labor and the State. Since the judgment had to be implemented by the New Hampshire Department of Employment Security and since this department is completely autonomous, there can be no settlement without its approval.

It must also be noted that House Bill 808's statement of purpose expresses clearly and forcibly the opinion of the New Hampshire Legislature that it had no other alternative but to accede to this "federal intrusion of its sovereignty" and that the legislation was enacted "under duress and for no other reason."

refusal to amend its law to accommodate the unconstitutional public sector program financing requirements." Brief at 66. This admission is repeated in its supplemental brief at 11.

This is clearly not the type of case where statutory interpretation makes it unnecessary to meet the constitutional issues. New Hampshire made it clear before the ALJ at the hearing, and before us, that it was refusing to conform because it felt that the statute itself was unconstitutional. New Hampshire's decision to put all its eggs in the constitutional basket, however, does not mean that we can avoid our statutory duty of review of the Secretary's order. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979). We must determine whether there is substantial evidence on the record to support the Secretary's findings.[3]

The evidence presented at the hearing can be summarized as follows. New Hampshire was advised during the period October 21, 1976, through June 24, 1978, by the Department of Labor what amendments would be necessary to bring its unemployment compensation law into conformity with 26 U.S.C. § 3304. The Department of Labor specifically informed the state that its law was deficient in the six categories already outlined.

The evidence was uncontradicted that, although New Hampshire has provided full unemployment insurance coverage for its permanent and classified civil service employees, temporary and seasonal workers and those not classified are not covered. N.H. Rev. Stat. Ann. § 282:1-H(4)(g) and (q) specifically exclude from coverage employees of political subdivisions and nonclassified state workers. The finding of the Secretary that New Hampshire did not meet the requirements of federal law as to coverage of employees of the state and its political subdivisions was clearly correct. This finding is also the basis for the Secretary's deter-

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[3]26 U.S.C. § 3310(b) provides in pertinent part:

> (b) *Findings of fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive[.]

mination that the option provisions of the federal statute were not met because, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:6-A-2, payments into the unemployment compensation fund by political subdivisions of the state were limited to those who had elected coverage.

N.H. Rev. Stat. Ann. § 282:1-H(4)(s)(3) specifically excludes from coverage those "in the employ of a school which is not an institution of higher education." This is directly contrary to the 1976 FUTA amendment which requires the states to cover employees of nonprofit schools below the level of institutions of higher education.

Under subsections (B) and (C) of 26 U.S.C. § 3304(a)(14), information as to alien status must be uniformly required from all compensation applicants, and a state agency can only deny compensation because of alien status on a preponderance of the evidence. New Hampshire law does not have any alien status conforming provisions. Under N.H. Rev. Stat. Ann. § 282:1-N(1)(a), it is specified that wages shall not include the amount of any payment to an alien unless he was in the United States under color of law. The Secretary found this provision was ambiguous and might conflict with federal law relative to aliens from a country contiguous to that of the state in which he is employed. We agree.

The Secretary properly found that, under New Hampshire law, N.H. Rev. Stat. Ann. § 282:1-0, payments to athletes between seasons were not prohibited as required by federal law, but only reduced by eliminating the sports income from the athlete's base period earnings.

The Secretary's findings as to employees of educational institutions are based on a restricted and technical reading of the federal statutory provisions. If this were the only issue, we might be persuaded to find that New Hampshire was in substantial compliance, but the broad provisions of the New Hampshire statute, N.H. Rev. Stat. Ann. § 282:3-F, leave too much to interpretation and construction to satisfy the tight federal requirements.

We uphold the decision of the administrative law judge, as modified and adopted by the Secretary, that New Hampshire's Unemployment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendements to FUTA.

The constitutional issue can be stated thusly: do the 1976 amendments to FUTA violate the sovereign integrity of the states and impair their ability to function effectively under the federal system as guaranteed by the tenth amendment.

The basic question is whether this case falls within the new furrow ploughed by *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or follows in the wake of *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). In *Usery*, the Supreme Court, in a five to four decision, overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968),[4] and held that the 1974 amendments of the Fair Labor Standards Act (FLSA) extending its provisions to employees of the states and their political subdivisions were unconstitutional and prohibited by the tenth amendment. Petitioners urge that its holding and rationale also doom the 1976 FUTA amendments which apply to the same employee groups.

We note first that only two of the six nonconformity findings implicate the tenth amendment, the one pertaining to coverage of employees of the state and its political subdivisions[5] and the option given these entities relative to the method of payment.[6]

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[4]"While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are, therefore, persuaded that *Wirtz* must be overruled." *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976).

[5]The other four nonconformity findings are limited to the private sector. New Hampshire, in its latest brief, acknowledges its duty to conform to the 1976 amendments as they apply to the private sector, but argues that respondent Secretary waived these requirements pending resolution of the constitutional issue. The Secretary denied any waiver and argues that New Hampshire is precluded from asserting a waiver since it was not raised below. We find no evidence of a waiver by the Secretary.

Our analysis begins with the obvious; that we are dealing with a different federal statute and, more importantly, a different regulatory method than was at issue in *Usery*. The minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) invalidated in *Usery* were imposed on the states by command. The authority for such command rested on the commerce clause. On the other hand, the 1976 FUTA amendments, following the design of the original Act, were not based on the commerce clause and were not directly imposed on the states which had the option of conforming or not.

There is no doubt that *Usery* focused on the command of the FLSA amendments that the states must adopt the maximum hours and minimum wage provisions for its own employees.

> The Act, speaking directly to the states *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress.

National League of Cities v. *Usery, supra*, 426 U.S. at 847-48.

> But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the states for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

Id. at 849.

This command to the state is given bite by 29 U.S.C. § 216, which provides for both civil and criminal penalties in the event of a violation.

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[6]For purposes of this discussion, we include public school employees as employees of political subdivisions of the state. We are aware, of course, that in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), the Supreme Court held that a local school board was not an arm of the state and, therefore, not entitled to invoke the bar of the eleventh amendment. *Id.* at 280-81. We do not think, however, that this limitation applies to the tenth amendment.

In contrast, the basic premise and statutory scheme of the federal-state unemployment compensation program, which have remained unchanged since 1935, are based on the concept that a state is free to accept federal conditions by conforming to federal statutory requirements or can refuse to participate entirely. Unlike the legislation at issue in *Usery* and *Maryland* v. *Wirtz*, *supra*, the commerce clause is not implicated. Congress chose to advance this legislation through its spending power. In *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. 548 (1937), the validity of the tax on employers was upheld against constitutional attack. Mr. Justice Cardozo, writing for the majority, outlined the history and purpose of this historic legislation and held that "[t]he excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585. An attack on a state's (Alabama) conforming legislation on the ground that its enactment was coerced by the federal government was rebuffed in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. Petitioners assert that, while the 1976 federal statutory requirements are not imposed by fiat, as with the 1974 amendments to the FLSA, the coercive effect is the same. This is particularly so, they contend, because most of the financial burden for a state's decision not to conform falls on its private employers through loss of federal tax credits. All parties agree that the cost to the private employers in New Hampshire will be about forty million dollars in 1978 tax credits. It is argued that by holding the private employers "ransom," Congress coerces compliance.

We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.[7] The basic

[7]New Hampshire is the only state that has opted not to conform. It

design and mechanism of the Act have not changed since 1935. Its coverage has been extended,[8] but the percentage of tax credits remains essentially the same.[9] The primary reason, of course, for the increase in the dollar amount of tax credits has been the expansion of our economy since 1935. The increase in the number of employers and employees and the amount paid in wages has meant a corresponding increase in the dollar amount of tax credits.

We must also recognize that, since 1935, the philosophy and objective of the unemployment compensation program, *viz.*, that unemployment is a national problem that must be dealt with on a national basis, have been woven into the fabric of our society.[10]

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repeatedly stresses in its brief the burden on the state's employers if the Act is held constitutional. We observe that it is easy to gamble for high stakes when the money on the table comes from someone else's pocket.

[8]The categories of employees has expanded. Single employees are now covered. Federal civilian employees were included in 1954 with provisions to reimburse the states for the benefits paid and the administrative costs. In 1966, federal military personnel were covered. In 1970, conformity requirements were passed to extend coverage to employees of large nonprofit organizations and employees of state hospitals and state institutions of higher learning. The 1976 amendments extended the tax to farms which employ ten or more workers for certain time periods or pay at least $20,000 in wages in any calendar quarter. 29 U.S.C. § 3306(a)(2). Under 26 U.S.C. § 3306(a)(3), employees of domestic workers were included.

[9]Originally, FUTA was based on the total wages of each employee. In 1940, the tax was limited to the first $3,000 of each employee's wages. At present, the tax base is the first $6,000 of wages. Unemployment Compensation Amendments of 1976. The tax rate has gone from 3.0 percent to its present rate of 3.4 percent; the tax credit has remained constant at 2.7 percent.

[10]In the Emergency Unemployment Compensation Act of 1974, Congress extended emergency benefits for individuals who had exhausted their regular benefits during a period of high unemployment. Although emergency benefits were funded entirely by the federal government, only certified states could participate in the program. The Emergency Jobs and Unemployment Assistance Act of 1974 provided unemployment benefits for individuals generally not covered under the regular program, *i.e.*, agricultural and domestic

In *Usery*, the Court specifically refrained from deciding whether the spending power could be unconstitutionally used to impair state sovereignty:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

National League of Cities v. *Usery*, 426 U.S. at 852 n.17.

We construe *Usery* to hold that congressional legislation based upon the commerce clause which impairs the sovereign functions of the states is unconstitutional. Two other circuits have refused to extend the *Usery* doctrine to legislation not squarely bottomed on the commerce clause. In *Usery* v. *Charlestown City School District*, 558 F.2d 1169 (4th Cir. 1977), and in *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977), the courts rejected arguments that, in light of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Equal Pay Act was

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workers and employees of state and local governments. This program was fully funded by the federal government, but was payable only in areas designated by the Secretary of Labor during periods of high unemployment. During fiscal 1976, the federal government paid about 3.4 billion dollars in emergency benefits. U.S. Dept. of Labor, Sixty-Fourth Annual Report 12-13 (1976). Federal grants to the states for the administration of their unemployment compensation program amounted to over $9,000,000 for fiscal 1977. 1 House Hearings before SubComm. of Comm. on Appropriations, 95th Cong. 2d Sess. 191 (1978). When state reserves are insufficient to meet the need for benefit payments, the federal government through the unemployment trust fund lends the needed funds to the state. Such loans are interest free. As of February 1, 1978, there were outstanding loans to twenty-one states in the aggregate amount of $4.9 billion. 1 House Hearings, *supra*, at 168-69. Federal appropriations of FUTA tax receipts to the unemployment trust fund amounted to over $1.5 billion in fiscal 1976, and almost $2 billion in fiscal 1977. The Budget of the U.S., Fiscal Year 1978, App. 508; The Budget of the U.S., Fiscal Year 1979, App. 621.

an unconstitutional exercise of congressional authority under the commerce clause. Both courts viewed the application of the Equal Pay Act to the states as a legitimate exercise of congressional authority to adopt legislation enforcing the fourteenth amendment's guaranty of equal protection of the law. Similarly, in *Arritt* v. *Grissell*, 567 F.2d 1267 (4th Cir. 1977), the court held that Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, under section 5 of the fourteenth amendment,[11] rejecting the contention that the ADEA was impermissibly grounded on the commerce clause.

The tax at issue here, FUTA, is not based on the power of Congress under the commerce clause. Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program. Inducing state participation in national progams by the offer of federal funds is not limited to the unemployment compensation program. In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978), the issue of the constitutionality of a conformity addition to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.* was raised. In upholding the constitutionality of the Act, the court specificaly stated:

> It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag.*, *supra*, 530 F.2d 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not "coercive" in the constitutional sense (emphasis in original).

[11] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Id. at 535-36.

Under the Medicaid Act, Title XIX of the Social Security Act of 1965, participating states are enabled by the use of federal funds to provide medical services for welfare recipients. A state's participation in Medicaid is voluntary but, if it chooses to participate, its plan must conform to the requirements imposed by the Medicaid Act. *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 124 (1st Cir.), *cert. denied*, 47 U.S.L.W. 3745 (May 15, 1979).

Since it can be argued that *Usery* was based on two separate and distinct concepts, the tenth amendment supremacy over the commerce clause *and/or* the impairment of state sovereignty, we next consider the evidence presented at the Labor Department hearing on impairment of New Hampshire's sovereignty due to the cost of extending unemployment benefits to uncovered state employees and employees of its political subdivisions. The finance officer of the City of Manchester (New Hampshire's largest city) testified that over the past nine years no permanent employees had been laid off, but the cost of covering the City's temporary seasonal employees would require costly new staffing and record-keeping practices which would affect the ability of the City to maintain existing programs. The testimony of Elizabeth Puddington, a consultant to the New Hampshire School Boards Association, was that, because of New Hampshire's dependence on the property tax and the difficulties inherent in increasing revenues therefrom, the cost of extending unemployment benefits to public schools would probably result in a curtailment of educational programs.

The sale of liquor through state licensed stores is one of the main sources of state revenue. The Director of Merchandising and Accounts of the New Hampshire State Liquor Commission estimated that the cost of extending unemployment benefits to Commission employees would be $75,000-$80,000 annually with a potential cost of $120,000 annually. The Comptroller of the State testified that the annual cost under

the reimbursement method of financing unemployment benefits could amount to as much as $4.3 million and that, under the alternate contributing tax method, the cost would be about $300,000.

The cost to the New Hampshire Department of Employment Security for administering the additional coverage would be between $75,000 and $150,000 annually, according to the affidavit of its deputy commissioner. There was also affidavit testimony as to the additional cost to the Department of Health and Welfare - $30,528 and $4,830 for the Fish and Game Department.

The overall cost to New Hampshire and its political subdivisions for unemployment coverage was the subject of expert testimony at the hearing. Lennox L. Moak was the expert for the state. He testified that the additional cost to the state would be $200,000 and $900,000 for its political subdivisions, for a total of $1,100,000. Dr. James D. Van Erden testified as an expert for the Labor Department. He estimated that the total cost to New Hampshire and its political subdivisions for fiscal 1978 would amount to $227,585, for fiscal 1979, $288,935, and for fiscal 1980, $330,787.[12]

Unlike the effect of the wage and hour standards in *Usery*, we do not think that this evidence establishes that extending coverage to the employees of New Hampshire and its political subdivisions will "significantly alter or displace" the ability of New Hampshire "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." *National League of Cities* v. *Usery*, 426 U.S. at 851. FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees. Its administration is entirely within the control of the state. *See Pearce* v.

[12]In reviewing the findings of the ALJ, the Secretary made the following conclusion of law, which we find to be correct. "Due to New Hampshire's base period and benefit year, all of the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments."

Wichita County, 590 F.2d 128 (5th Cir. 1979), and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), in which the Equal Pay Act was upheld as constitutional under the commerce clause on the grounds that, unlike the minimum wage provisions condemned in *Usery*, the provisions of the Equal Pay Act did not impermissibly interfere with the states' employment scheme.

We hold that the 1976 amendments to FUTA relative to employees of a state or its political subdivisions do not impair the sovereignty of New Hampshire and have not been rendered unconstitutional by *Usery*.

There is one more matter that requires our attention, the request of Amicus Los Angeles County to reconsider our order dismissing it as a named petitioner in the case. Our order is reaffirmed for lack of jurisdiction under 26 U.S.C. § 3310(a).[13] We must also note that Amicus is represented by the same attorneys representing the State of New Hampshire Department of Employment Security. By use of the Amicus format, the petitioner has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle.

CAMPBELL, *Circuit Judge* (Concurring). Like my colleagues, I find substantial evidence to support the decision of the Secretary of Labor that New Hampshire's unemployment compensation law failed in six specific respects to conform to the 1976 federal amendments. *See* 26 U.S.C. § 3310(b). This being so, even if New Hampshire's constitutional challenge to

[13] 26 U.S.C. § 3310(a) provides in pertinent part:

> Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

the statutory provision requiring it to provide unemployment coverage to state and local employees were correct, the Secretary was nonetheless entitled to withhold funding. Given an adequate statutory ground upon which to uphold the Secretary's decision, I therefore believe it to be unnecessary and inappropriate to decide New Hampshire's constitutional challenge.

Under 26 U.S.C. § 3304(c), the Secretary is commanded by Congress to withhold certification from any state which the Secretary "finds has failed to amend its law so that it contains *each* of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein." (Emphasis added.) As I read this law, if the state's enactment fails to conform to the federal requirements in even one material respect, the Secretary is required to withhold certification. New Hampshire concedes that its law has not been amended to conform to the federal requirements, and that the law is deficient in six different areas. The state's constitutional challenge, however, relates to only two of these areas, those involving coverage for public employees. Even were we to find this part of the federal act unconstitutional, as New Hampshire urges, we would nevertheless be constrained to affirm the decision of the Secretary insofar as it rests on the four provisions of the 1976 amendments that are undoubtedly constitutional.[1]

> As the Supreme Court has recently observed:
> " 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector*

[1]I think it is plain that *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), would foreclose any attempt by the state to argue that the federal act is unconstitutional in its application to private employers. Four of the requirements to which New Hampshire's statute was found not to conform concerned private employers only. See discussion in majority opinion at pp. 7-8.

> *Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105. Before deciding [a] constitutional question, it [is] incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive."

New York Transit Authority v. *Beazer*, 440 U.S. 568, 582 (1979); *see also Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-69 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Since the statutory ground in this case is entirely dispositive, I see no reason to follow the parties into collateral issues. If New Hampshire wished a ruling on its point of constitutional law, it should first have conformed its laws in all respects not implicating the constitutional issue.

I would add that apart from the reasons given above for avoiding constitutional adjudication, I take no particular exception to the court's decision.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

In the Matter of	*	
U.S. DEPARTMENT OF LABOR	*	
V.	*	CONFORMITY PROCEEDING
STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY	*	

DECISION OF THE SECRETARY

The Unemployment Compensation Law of the State of New Hampshire must be determined by the Secretary of Labor, by October 31, 1978, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA in order to be certified under section 3304(c) of FUTA and thereby to have that State receive the benefits for itself and its inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of its unemployment compensation law as well as tax credits for

private employers within the State. The purpose of this proceeding is to determine whether the New Hampshire Unemployment Compensation Law is in conformity with the requirements of FUTA.

Pursuant to a notice published in the Federal Register (43 F.R. 26500, 36721, 42048) and rules of procedure incorporated therein, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which the parties were afforded the opportunity to examine witnesses and introduce documentary evidence relating to the issues of conformity as well as to the constitutionality of certain federal requirements. Thereafter, briefs and proposed findings of fact and conclusions of law were filed by the parties.

On October 13, 1978, the Judge issued a recommended decision in the matter, (hereinafter sometimes referred to as Rec. Dec. or R.D.), in which he found that the New Hampshire Unemployment Compensation Law is not in conformity with the requirements of FUTA with regard to each of

the six conformity issues (and sub-issues) specified in the notice of hearing. He also made findings of fact relating to the issues of constitutionality, in accordance with the rules of procedure.

The New Hampshire Department of Employment Security (NHDES) and the U.S. Department of Labor (USDOL) have filed exceptions to the Administrative Law Judge's recommended decision.

The U.S. Department of Labor has excepted to certain of the findings of fact on the issues of constitutionality contained in the Judge's recommended decision. The USDOL notes that findings nos. 6, 7, 8, and 9 (Rec. Dec., pp. 31-32) all incorporate cost estimates, and that such findings are based upon the affidavits of four New Hampshire state officials, Fowler, Buswell, Whalen, and Barry, which contain such estimates. The USDOL contends that the affidavits in question should be given no weight because, among other things, three of them contain no explanation of the assumptions or factors used to arrive at

their cost estimates, the fourth makes only a general reference to "our past experience, " and none of the four officials was present at the hearing and subject to cross-examination as to the basis for arriving at his cost estimate. For these and other reasons the USDOL argues that the affidavits are deficient, and therefore the findings of the Judge based upon them should be deleted. I agree. Accordingly, findings of fact nos. 6, 7, 8, and 9 on the issues of constitutionality contained in the Judge's recommended decision at pages 31-32, are deleted.

The USDOL takes exception to certain other findings on the issues of constitutionality which contain cost estimates. In its Statement of Exceptions (at pages 5-6, it states:

> Subparagraphs 3(1) and 4(a) of the 'Findings of Fact on the Issues of Constitutionality' (R.D. at 29, 30) contain cost estimates from the oral testimony of two New Hampshire officials: Robert Herlihy, Director of Merchandising and Accounts for the New Hampshire State Liquor Commission, and Daniel Durgin, Business Administrator for Supervisory Union 16 of Exeter, New Hampshire, and President of the New Hampshire School Administrator's Association. Both Mr. Herlihy and Mr. Dur-

gin testified that they based their cost estimates on the contributions method of financing, multiplying the number of employees in their respective governmental units times $6,000 times 2.7 percent. (Herlihy, Tr. at 147, 152; Durgin, Tr. at 158, 161, 166). This is the statutory formula for assessing contributions from new private employers under current New Hampshire law. (See Section 282.6 of the New Hampshire Unemployment Compensation Law (NHUCL)). These estimates ignore the fact that, even under the current NHUCL, employers with relatively low turnover can eventually earn an experience rating which enables them to make contributions at a tax rate of less than 2.7 percent. (See Section 282.6, D of the NHUCL). These estimates also ignore the fact that the state may enact a special contribution plan for governmental entities which may establish a standard rate for such entities which is less than 2.7 percent.

More importantly, neither Mr. Herlihy nor Mr. Durgin even attempted to make an estimate of the actual cost of coverage which would be incurred on a dollar-for-dollar reimbursement basis. As Dr. Van Erden testified, the formula used by these New Hampshire witnesses may indicate revenue to the state unemployment trust fund at a tax rate of 2.7 percent, but it does not indicate the likely actual cost of additional coverage. (Tr. at 322-325).

For the reasons just stated, the Department takes exception to subparagraphs 3(1) and 4(a) of the 'Findings of Fact on the Issues of Constitutionality." (R.D. at 29, 30). Therefore, subparagraphs 3(1) and 4(a) should be deleted.***

For the reasons stated in the Statement of Exceptions filed by the USDOL (at pages 5-6), which I find to be sound and persuasive, nos. 3(1) and 4(a) of the Findings of Fact on the Issues of Constitutionality, at pages 29-30 of the Recommended Decision, are deleted.

The USDOL takes exception to the Judge's failure to consider and make findings with regard to the testimony of three of its witnesses at the hearing, Mr. Rubin, Mr. Rosbrow, and Mr. Wasserman. It contends that a decision in this proceeding would be incomplete without a consideration of the evidence and expert opinions they presented, and findings based thereon. Therefore, the USDOL proposes the following additional findings of fact and conclusions of law relating to the issues of constitutionality (USDOL Statement of Exceptions, pp. 7-11):

Findings of Fact

1. Even if a student earned enough in a summer job to meet New Hampshire's financial eligibility tests, a full-time student would rarely meet the eligibility requirement that he or she be available for

and seeking permanent, full-time work. (US DOL) Proposed F/F 31; USDOL Posthearing Brief at 35-37).

2. The financial eligibility and rigorous availability requirements in the New Hampshire Unemployment Compensation Law act to reduce the number of former temporary, seasonal, and part-time state and local government employees who are likely to collect unemployment benefits. (USDOL Proposed F/F 32; USDOL Posthearing Brief at 37).

3. The amount of benefits payable to individuals with part-time and/or temporary work experience is not likely to be as high as the amount payable to former full-time, permanent employees. (USDOL Proposed F/F 33; USDOL Posthearing Brief at 37-38).

4. The extension of coverage to additional state and local government employees will not create any significant new record-keeping or administrative burdens for New Hampshire public employers. (USDOL Proposed F/F 34; USDOL Posthearing Brief at 39-40).

5. NHDES witnesses testified uniformly that the subject of unemployment compensation had never come up in their collective bargaining experience with New Hampshire public employees. Mr. Donald Wasserman, Research Director for the American Federation of State, County, and Municipal Employees (AFSCME), testified that he was aware of no jurisdiction other than in one occasion in the State of Delaware in which his union had attempted to negotiate coverage of unemployment compensation as part of a collective bargaining agreement. Instead, the union has treated such coverage as a legislative matter, not as a subject of collective bargaining. (Tr. at

463). This evidence shows that the extension of coverage provided for by the 1976 Amendments will not interfere with the employer-employee relationship in the public sector in New Hampshire, since unemployment compensation is generally not a subject of collective bargaining. (USDOL Proposed F/F 35; USDOL Posthearing Brief at 40).

6. Congress passed the 1976 Amendments as a matter of equity, in order to protect public as well as private sector employees against the risks of unemployment. (USDOL Proposed F/F 40; USDOL Posthearing Brief at 47).

7. The need of public employees for unemployment compensation is even greater than that of employees in the private sector. This is because, unlike the private sector, the public sector contains virtually no substitutes for unemployment compensation, such as severance pay or private supplemental unemployment benefits. For example, only one of some forty-odd AFSCME contracts in New Hampshire contains any kind of severance pay provision. Wages also tend to be higher in private sector than in the State and local government sector, so that the absence of unemployment compensation for public employees is not counter-balanced by higher wages (and thus the possibility of greater savings to act as a cushion against wage loss occasioned by unemployment). (USDOL Proposed F/F 41; USDOL Posthearing Brief at 48).

8. Any costs incident to the extension of coverage to additional state and local government employees are outweighed by the benefits to the newly covered employees themselves. (USDOL Proposed F/F 42; USDOL Posthearing Brief at 47-48).

Conclusions of Law

1. Due to New Hampshire's base period and benefit year, all the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments. (US DOL Proposed C/L 21; USDOL Posthearing Brief at 19).

2. Section 282.2, B of the New Hampshire Unemployment Compensation Law provides that an individual must have earned at least $1,200 during his base period, including at least $300 in each of two calendar quarters, to qualify for benefits. (USDOL Proposed C/L 22).

3. Section 282.3,D of the New Hampshire Unemployment Compensation Law provides that an unemployed individual is eligible for benefits only if "(h)e is available for and seeking permanent, full-time work for which he is qualified." (USDOL Proposed C/L 23).

4. The cost of Unemployment benefits for former Comprehensive Employment and Training Act (CETA) employees is borne by the Federal Government, not by state or local governments. (USDOL Proposed C/L 24; USDOL Posthearing Brief at 37; Tr. at 244).

5. The Federal Unemployment Tax Act (FUTA) permits state and local governments a number of financing options in meeting the cost of extending coverage to their employees. The two major financing options are the reimbursement method and the contribution method. FUTA requires that every conforming state offer its local governments the option of financing benefits by dollar-

for-dollar reimbursement of benefits actually paid, or through assessment of a payroll tax (contribution) at a set rate. (USDOL Proposed C/L 25; USDOL Posthearing Brief at 41-42; Tr. at 414-419).

6. A number of variations on the major options are also possible under FUTA. For example, a governmental unit could adopt a delayed reimbursement method, postponing the reimbursement until after the fiscal year in which benefits were paid. This would remove budgetary uncertainty for governments otherwise preferring reimbursement to contribution. Under the contribution method, a state could adopt a special, lower tax rate for public employers if unemployment tended to be lower in the public than in the private sector. Federal law would even allow the state itself to finance the cost of coverage for local governmental units, an approach which might commend itself if the state had greater financial resources and a more varied potential tax base than its political subdivisions. Such variations are wholly within the control of the state. (US DOL Proposed C/L 26; USDOL Posthearing Brief at 41-42; Tr. at 414-419).

7. In essence, FUTA requires that public and private sector employees be treated equally with regard to unemployment compensation coverage. However, factors such as qualifying wages, qualifying weeks of employment, eligibility requirements, disqualifications, weekly benefit amounts, and duration of benefits are all matters of state discretion and can be changed, if changed in a nondiscriminatory manner. (USDOL Proposed C/L 27; USDOL Posthearing Brief at 45-46; Tr. at 239-240).

8. FUTA does not require that all temporary, seasonal, and part-time employees be eligible for benefits; it merely forbids treating them differently in the public and private sectors. Thus, a state could adopt a stronger labor force attachment requirement for all workers, such as requiring a certain number of weeks of work during the base period. For example, the State of New York requires that an individual must have earned at least $40 in each of 20 different weeks during his base period to be eligible for benefits. This type of requirement makes it much more difficult for temporary workers to qualify for benefits than under New Hampshire's present law. (USDOL Proposed C/L 28; Tr. 419-423).

9. FUTA leaves New Hampshire, as well as each of the other states, free to reduce its costs and those of its political subdivisions to whatever extent it deems appropriate by modifying various provisions of its unemployment compensation law (such as the weekly benefit amount, duration of benefits, eligibility requirements, etc.), as long as in so doing it does not discriminate between public and private sector employees. USDOL Proposed C/L 29; USDOL Post-hearing Brief at 45-46).

Contrary to the views expressed in the NHDES Statement of Exceptions, I find that the additional findings of fact and conclusions of law relating to the issues of constitutionality which are proposed by the USDOL on pages 7-11 of its Statement of Exceptions and are set out above, are supported

by record, are in accordance with law, and are proper, and I adopt them as my own.

In addition to the proposed findings of fact and conclusions of law set out above, certain other proposed findings of fact offered by the USDOL were omitted from the Recommended Decision. The USDOL takes exception to these omissions, and proposes the following additional findings of fact relating to the issues of constitutionality (USDOL Statement of Exceptions, p. 12):

> 1. If New Hampshire had enacted a law conforming to the 1976 Amendments effective January 1, 1978, data supplied by NHDES indicates that such a law would have added some 35,000 newly covered state and local government employees, of whom some 62% would have been employed in full-time permanent positions. (USDOL Proposed F/F 28; USDOL Posthearing Brief at 34-35).
>
> 2. Evidence from the State of New Hampshire and the City of Manchester indicates that involuntary turnover in their full-time permanent positions is almost non-existent. (USDOL Proposed F/F 29; USDOL Posthearing Brief at 35).
>
> 3. Even for those newly covered employees who are in temporary or part-time positions, NHDES has not demonstrated what proportion of such employees would meet state eligibility requirements or what level of benefits such employees would draw. (USDOL Proposed F/F 30; USDOL Posthearing Brief at 35-36. In fact, USDOL requested

data from NHDES in interrogatories filed July 17, 1978; but it was never supplied.)

I find that such proposed findings in the three numbered paragraphs immediately above, are supported by the record, are proper, and I adopt them as my own.

Although the USDOL concurs in the cost findings contained in no. 17 of the Findings of Fact on the Issues of Constitutionality, (Rec. Dec., pp. 33-35), it states that this portion of the decision would be strengthened by an explanation of why Dr. Van Erden's cost estimates were accorded greater weight than those of Mr. Moak. The USDOL takes exception to this omission, and proposes the following additonal findings of fact with respect to the testimony of Mr. Moak, which would be inserted immediately after find no. 13, found on pages 32-33 of the Recommended Decision. (US DOL Statement of Exceptions, p. 13):

1. The cost estimate developed by Mr. Moak on behalf of NHDES was as follows:

FY 1977	$1,140,000
FY 1979	1,352,000
FY 1980	1,510,000

2. Mr. Moak reached his estimate by using New Hampshire data for 1977. Using 1977 data he developed a unit cost of coverage per state employee, which he then used to estimate costs for both state and local government employees in 1979 and 1980.

3. Mr. Moak's method seriously overstates the likely costs of the extension of coverage by using 1977 data for separations and for duration of benefits. Actual 1978 data shows both the insured unemployment rate (IUR) and the average duration of benefits have dropped significantly, and economic projections indicate both are likely to drop further or level off during fiscal years 1979 and 1980. Mr. Moak, in contrast, assumed a constant economic situation since 1977, and an assumption not reflected in actual data for 1978 or in generally accepted economic forecasts for 1979 and 1980. This assumption led him to a serious overestimate of the costs of additional coverage in those years. (See USDOL Proposed F/F 18-21, USDOL Posthearing Brief at 23-31).

In addition the USDOL urges that finding no. 17 (Rec. Dec. at p.33) should be amended to read, in pertinent part, as follows: "... I find and conclude that the projections and estimates of Dr. Van Erden are to be accorded the greater weight, due to the superiority of his methodology and his assumptions, in particular his consideration of actual data for 1978 and generally accepted economic forecasts for 1978 and 1979...".

Contrary to the position of the State of New Hampshire Department of Employment Security in its Statement of Exceptions, the additional findings with respect to Mr. Moak's testimony and cost extimates which have been proposed by the USDOL, as well as its proposed amendment of finding no. 17 concerning the reasons for the greater weight to be accorded Dr. Van Erden's estimates, as set out above, are supported by the record and are well founded, and they are hereby adopted.

The USDOL takes exception to the failure of the Recommended Decision to specify what weight, if any, was given to nationwide evidence offered at the hearing relating to the impact of the extension of unemployment insurance coverage to state and local government employees. The USDOL states (Statement of Exceptions, p. 14):

> The history of this New Hampshire conformity proceeding reveals a continuing dispute between the parties as to the admissibility of nationwide evidence. The presiding administrative law judge ruled such evidence admissible at the hearing, but it is unclear what weight, if any, he gave such evidence in his Recommended Decision. (The Recommended Decision appears to contain no

findings on such evidence.) USDOL, therefore, proposes the following additional finding of fact to clarify this issue:

> Nationwide data was admitted by the administrative law judge at the hearing over UDSOL objections. This evidence, in the form of both testimony and affidavits, tends to show that neither layoffs of public employees nor curtailments of government services have resulted from the extension of unemployment insurance coverage to state and local employees. (See USDOL Posthearing Brief at 32-33, 43-45; Exhibit ALJ-45.) However, since the instant proceeding involves conformity and its impact in New Hampshire, I find that nationwide evidence is entitled to little weight.

In my opinion, the additional finding of fact proposed by the USDOL with regard to nationwide evidence, as setout immediately above, is sound and proper, and it is adopted.

In its Statement of Exceptions, at pages 14-17, the USDOL takes exception to the treatment of conformity issues in the Recommended Decision (referred to in the exceptions as "R.D."), as follows:

> The 'Findings as to Conformity of New Hampshire Law to Federal Requirements,' R.D. at 10-13, paragraph 19-23(e), and the 'Conclu-

sions of Law on the Issues of Conformity,' R.D. at 13-23, paragraphs 2-7(e), are largely redundant. The 'Findings,' R.D. at 10-13, appear to be taken from USDOL's proposed conclusions of law #15-20c while the 'Conclusions, ' R.D. at 13-23, appear to be taken from USDOL's prehearing brief (p.3-19). However, certain discrepancies also exist. The 'Findings' omit USDOL proposed conclusions of law #18b, dealing with the treatment of aliens in a contiguous country, and #20a, dealing with the nonconformity of the NHUCL 'between-terms denial' provision during the months of November and December, 1977. The 'Conclusions' address the treatment of aliens in a contiquous country but again omit the 1977 conformity issue.

USDOL proposes the following resolution for the above difficuties. The ' Conclusions of Law on the Issues of Conformity', R.D. at 13-23, should be supplemented by the following additional conclusion of law:

> 7(f) The prior § 3304(a)(6)(A) of FUTA, as enacted by section 104(a) of P.L. 91-373, required an approved State law, effective January 1, 1972, to provide that--
>
> > (6)(A) compensation is payable on the basis of service to which section 3309 (a) (1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that, with resepect to service in an instructional, research, or principal administrative capacity for an institution of higher education to which section 3309 (a)(1) ap-

> plies, compensation shall not be payable based on such service for any week commencing during the period between two successive academic years (or, when the contract provides instead for a similar period between two regular but not successive terms, during such period) to any individual who has a contract to perform services in any such capacity for any institution or institutions of higher education for both of such academic years or both of such terms, and
>
> * * * * *

Although this provision of FUTA was superseded by the currently effective §3304(a)(6)(A) on January 1, 1978, it was effective until December 31, 1977. Under the above cited provision, for the period prior to January 1, 1978, 'between terms' denial could apply only to those individuals who performed services for a nonprofit or state institution of higher education in an instructional, research or principal administrative capacity (i.e., so-called 'professional' capacities). This provision did not authorize a between terms denial with respect to those who performed services for such an institution of higher education in a non-professional capacity.

Section 282:3,F of the NHUCL provides, effective July 1, 1977, than an employed individual shall be eligible to receive benefits with respect to any week only if the director finds that:

> F. He is not seeking benefits for any week commencing during summer or other vacation breaks, semester breaks, or any other time during which a school or other academic institution is not in session, between two successive academic years or terms or any other period, if he has a contract to perform, or there is a reasonable assurance that he will perform, professional or non-professional services in the second of such academic periods and he performed such services during the first of such academic periods.

The above quoted New Hampshire provision denies benefits to individuals who performed services in a nonprofessional capacity in the first of two academic periods if they seek benefits betwen the first and second academic periods and there is a contract or a reasonable assurance to perform nonprofessional or professional services in the second academic period. Such a denial under the 'between terms' denial provision is inconsistent with the 'equal treatment' requirement of §3304 (a) (6) (A) cited above. Thus, for November and December, 1977 the NHUCL failed to conform to the then effective §3304 (a) (6) (A) of FUTA because it does apply 'between terms' denial to non-professionals of such institutions.

I find that the USDOL's proposal is well founded.

Accordingly, an additional conclusion of law on

the issues of conformity, designated 7(f) and worded as set out above, is inserted immediately after conclusion 7(e) on page 23 of the Recommended Decision.

The USDOL makes the further proposal (on pages 17 and 18 of its Statement of Exceptions) that certain findings, designated 22(c) and 23 (f), be added to the Recommended Decision. I believe that such proposal is well founded. Accordingly, the following findings, designated 22(c) and 23(f), are hereby added to the findings as to conformity of New Hampshire's law to Federal requirements, contained in the Recommended Decision, immediately after findings 22(b) and 23 (e) on pages 12 and 13 of such decision, respectively:

> 22(c). Since there exists no provision in the NHUCL which expressly provides that benefits will not be denied or reduced solley for the reasons specified in § 3304(a) (9) (A) of FUTA, and since it is unclear from § 282:1, (N) (a) of the NHUCL whether or not the phrase 'under color of law' is broad enough to encompass individuals in a contiguous country with which the United States has an agreement with respect to unemployment compensation

and who have been temporarily admitted into the United States for the purpose of performing services, a finding cannot be made that the NHUCL, effective January 1, 1978, has been amended to contain a provision which meets the requirements of § 3304 (a) (9) (A) of FUTA. (USDOL Proposed C/L 18b).

23(f). Under § 3304 (a) (6) (A) of FUTA as enacted by section 104 (a) of P.L. 91-373, which was effective until December 31, 1977, a 'between terms' denial could apply only to those individuals who performed services for a nonprofit or state institution of higher education in an instructional, research or principal administrative capacity (i.e., so-called 'professional' capacities). This provision did not authorize a between terms denial with respect to those who performed services for such an institution of higher education in a non-professional capacity. Section 282:3,F of the NHUCL, which was effective July 1, 1977, denies benefits to indivuduals who performed services in a non-professional capacity in the first of two academic periods if they seek benefits between the first and second academic periods and there is a contract or a reasonable assurance to perform non-professional or professional services in the second academic period. Such a denial under the 'between terms' denial provision is inconsistent with the 'equal treatment' requirement of § 3304 (a) (6) (A). Thus, for November and December, 1977 the NHUCL fails to conform to the then effective §3304 (a) (6) (A) of FUTA because it does apply 'between terms' denial to nonprofessionals of such institutions. (USDOL Proposed C/L 20a).

On pages 18-22 of its Statement of Exceptions, the USDOL lists a number of minor errors in the Recommended Decision (R.D.) which appear to be inadvertent but which affect the substantive accuracy of the decision; it also lists a number of proposed changes in language to clarify meaning, and a number of typographical errors. The proposed changes and corrections, as described by the USDOL, all of which I find to be well founded, are hereby made as indicated below:

1. In R.D. at 2, first full paragraph, delete last sentence and substitute: 'The purpose of the 1976 Amendments was to extend Unemployment Insurance coverage to employees of states and political subdivisions and certain other employees.'

2. In R.D. at 3, numbered paragraph 4, fifth line, delete the word 'code' and substitute 'color.'

3. In R.D. at 6, numbered paragraph 1, delete 'January 24, 1978' and substitute 'February 24, 1978.'

4. In R.D. at 9, numbered paragraph 7, delete 'June 13, 1978' and substitute 'June 15, 1978'; insert after 'a correction to the Revised Rules' the additional

phrase 'dated September 14, 1978.'

5. In R.D. at 10, numbered paragraph 16, delete last sentence and substitute: 'Under current federal law, none of these revenues could be used in support of the nonconforming State's private sector unemployment compensation program.' Congress, of course, could pass new legislation to establish interim coverage of private and/or public sector employees in a nonconforming state. (USDOL Response to NHDES Supplemental Interogatory No. 2, ALJ Exh. 48, p.14).

6. In R.D. at 11, numbered paragraph 21, lines 4-6, delete material inside parentheses, and add 'and nonprofit organizations which are required by sections 3304 (a) (6) (A) and 3309 (a) (1) to be covered by the state unemployment compensation law.' In the same paragraph, line 10, after the word 'entities' add 'and nonprofit organizations.'

7. In R.D. at 17, numbered paragraph 4(b), fourth line, delete '3304(a) (b) (A)' and substitute '3304 (a) (6) (A).'

8. In R.D. at 20, numbered paragraph 6(b), fifth line, change the word 'services' at the beginning of the line to 'seasons.'

9. In R.D. at 33, numbered paragraph 17a, delete 'has been estimated' and substitute 'is likely to be'; delete '40,421' and substitute '40,241.'

10. In R.D. at 33, numbered paragraph 17b, delete 'has been estimated' and substitute 'is likely to be.'

11. In R.D. at 34, numbered paragraph 17(e), delete 'has been estimated' and substitute 'is likely to be.'

12. In R.D. at 34, numbered paragraph 17 (g), delete last sentence and substitute: 'A reasonable estimate, based on historical data, of the ratio between the IUR for covered state and local employees and the IUR for the regular program is .26.'

13. In R.D. at 35, top of page, delete '$227,585' and substitute '$277,585.'

14. In R.D. at 35, 'Recommendation,' delete entire paragraph and substitute: 'Based upon the foregoing findings of fact and conclusions of law, the Secretary of Labor hereby determines that the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues (and sub-issues included therein) listed in the Notice of Hearing at 43 F.R. 26500 (June 20, 1978).'

Typographical Errors

1. In R.D. at 4, numbered paragraph 5, change 'athlethic' to athletic.'

2. In R.D. at 5, top page, change 'virture' to 'virtue.'

3. In R.D. at 7, numbered paragraph 2, thirteenth line, change 'labor' to 'Labor.'

4. In R.D. at 11, numbered paragraph 22, second line, change 'confrom' to

'conform.

5. In R.D. at 11, numbered paragraph 22 (a), second line, change 'form' to 'from.'

6. In R.D. at 14, top of page, delete first line (which duplicates last line at bottom of p.13).

7. In R.D. at 16, numbered paragraph 3 (c), last line, remove one '§' sign.

8. In R.D. at 17, numbered paragraph 4 (b), ninth line of quotation, change 'and' to 'an.'

9. In R.D. at 18, top of page, thirteenth line, change 'of' to 'or.'

10. In R.D. at 19, numbered paragraph 5(f), tenth line, change period to comma.

11. In R.D. at 20, numbered paragraph 6(b), fifth and sixth lines, change 'substanitally' to 'substantially.'

Additional typographical errors in the Recommended Decision which I have noted are hereby corrected, as follows:

1. On page 19, in paragraph 5(d), in the first line of the quotation of the provisions of Section 3304 (a) (9) (A) of FUTA, insert 'be' after 'shall not.'

2. On the same page of the Rec. Dec., in paragraph 5 (e), in the last line of the quoted provision, change

'color law' to read 'color of law.'

3. On page 34, in paragraph 17 (g), in the first line change 'uninsured' to 'insured' and in paragraph 17 (h), after 'Additional CE' delete the dollar signs before the figures 35,148, 37,609 and 40,241.'

I have carefully studied all the evidence in the record and have considered all the arguments presented with respect to the issues, including the exceptions to the Judge's recommended decision dated October 13, 1978. It is my conclusion that, except as indicated herein above, the findings of fact and conclusions of of law of the Judge with respect to the conformity issues which are contained in such decision, are supported by the evidence in the record, are in accordance with applicable law, and are proper, and I adopt them as my own.

Accordingly, I find that the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues (and sub-issues included

therein) listed in the Notice of Hearing at 43 F.R. 26500 (June 20, 1978).

I find, further, that except as indicated herein above, the findings of fact bearing on the issues of constitutionality which the Administrative Law Judge made in his recommended decision of October 13, 1978, are supported by the evidence in the record and are proper, and I adopt them as my own.

Dated at Washington, D.C.
this _____day of October, 1978.

_____
Secretary of Labor

FEDERAL STATUTES INVOLVED

26 U.S.C. §3301

§3301. RATE OF TAX

There is hereby imposed on every employer (as defined in section 3306(a)) for each calendar year an excise tax, with respect to having individuals in his employ, equal to-

(1) 3.4 percent, in the case of a calendar year beginning before the first calendar year after 1976, as of January 1 of which there is not a balance of repayable advances made to the extended unemployed compensation account (established by section 905(a) of the Social Security Act); or

(2) 3.2 percent, in the case of such first calendar year and each calendar year thereafter;

of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

Aug. 16, 1954, c. 736, 68A Stat. 439; Sept. 13, 1960, Pub.L. 86-778, Title V, §523(a), 74 Stat. 980; Mar. 24, 1961, Pub.L. 87-6, §14(a), 75 Stat. 16; May 29, 1963, Pub.L. 88-31, §2(a), 77 Stat. 51; Aug. 10, 1970, Pub.L. 91-373, Title III, §301(a), 84 Stat. 713; June 30, 1972, Pub. L. 92-329, §2(a), 86 Stat. 398; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §1903(a)(11), 90

Stat. 1808; Oct. 20, 1976, Pub.L. 94-566, Title II, §211(b), 90 Stat. 2676.

26 U.S.C. §3302

§3302. CREDITS AGAINST TAX

(a) Contributions to state unemployment funds.-

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in section 3304 for the 12-month period ending on October 31 of such year.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 6071 to file a return for such year; except that credit shall be permitted for contributions paid after such last day, but such credit shall not exceed 90 percent of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day.

(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation

law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 6071.

(b) Additional credit.-In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified as provided in section 3303 for the 12-month period ending on October 31 of such year, or with respect to any provisions thereof so certified, equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in such 12-month period to any person having individuals in his employ, or to a rate of 2.7 percent, whichever rate is lower.

(c) Limit on total credits.-

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

(2) If an advance or advances have been made to the unemployment account of a State under title XII of the Social Security Act, then the total credits (after applying subsections (a) and (b) and paragraph (1) of this subsection) otherwise allowable under this section for the taxable year in the case of a taxpayer subject to the unemployment compensation law of such State shall be reduced-

(A)(i) in the case of a taxable year beginning with the second consecutive January 1 as of the beginning of which there is a balance of such advances, by 10 percent of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State; and

(ii) in the case of any succeeding taxable year beginning with a consecutive January 1 as of the beginning of which there is a balance of such advances, by an additional 10 percent, for each such succeeding taxable year, of the tax imposed by section 3301 with respect to the wages paid by such taxpayer during such taxable year which are attributable to such State;

(B) in the case of a taxable year beginning with the third or fourth consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by

such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which-

(i) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year; and

(C) in the case of a taxable year beginning with the fifth or any succeeding consecutive January 1 as of the beginning of which there is a balance of such advances, by the amount determined by multiplying the wages paid by such taxpayer during such taxable year which are attributable to such State by the percentage (if any) by which-

(i) the 5-year benefit cost rate applicable to such State for such taxable year or (if higher) 2.7 percent, exceeds

(ii) the average employer contribution rate for such State for the calendar year preceding such taxable year.

The provisions of the preceding sentence shall not be applicable with respect to the taxable year beginning January 1, 1975, or any succeeding taxable year which begins before January 1, 1980; and, for purposes of such sentence, January 1, 1980, shall be deemed to be the first January 1 occurring after January 1, 1974, and consecutive taxable years in the period commencing January 1, 1980, shall be determined as if the taxable year which begins on January 1, 1980, were the taxable year immediately succeeding the taxable year which

began on January 1, 1974.

(3) If the Secretary of Labor determines that a State, or State agency, has not-

(A) entered into the agreement described in section 239 of the Trade Act of 1974, with the Secretary of Labor before July 15, 1975, or

(B) fulfilled its commitments under an agreement with the Secretary of Labor as described in section 239 of the Trade Act of 1974,

then, in the case of a taxpayer subject to the unemployment compensation law of such State, the total credits (after applying subsections (a) and (b) and paragraphs (1) and (2) of this section) otherwise allowable under this section for a year during which such State or agency does not enter into or fulfill such an agreement shall be reduced by 15 percent of the tax imposed with respect to wages paid by such taxpayer during such year which are attributable to such State.

(d) Definitions and special rules relating to subsection (c).-

(1) Rate of tax deemed to be 3 percent.- In applying subsection (c), the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of the rate provided by such section.

(2) Wages attributable to a particular state.-For purposes of subsection (c), wages shall be attributable to a particular State if

they are subject to the unemployment compensation law of the State, or (if not subject to the unemployment compensation law of any State) if they are determined (under rules or regulations prescribed by the Secretary) to be attributable to such State.

(3) Additional taxes inapplicable where advances are repaid before November 10 of taxable year.-Paragraph (2) of subsection (c) shall not apply with respect to any State for the taxable year if (as of the beginning of November 10 of such year) there is no balance of advances referred to in such paragraph.

(4) Average employer contribution rate.- For purposes of subparagraphs (B) and (C) of subsection (c)(2), the average employer contribution rate for any State for any calendar year is that percentage obtained by dividing-

(A) the total of the contributions paid into the State unemployment fund with respect to such calendar year, by

(B) the total of the remuneration subject to contributions under the State unemployment compensation law with respect to such calendar year.

For purposes of subparagraph (C) of subsection (c)(2), if the average employer contribution rate for any State for any calendar year (determined without regard to this sentence) equals or exceeds 2.7 percent, such rate shall be determined by increasing the amount taken into account under subparagraph (A) of the preceding sentence by the aggregate amount of employee payments (if any)

into the unemployment fund of such State with respect to such calendar year which are to be used solely in the payment of unemployment compensation.

(5) 5-year benefit cost rate.-For purposes of subparagraph (C) of subsection (c)(2), the 5-year benefit cost rate applicable to any State for any taxable year is that percentage obtained by dividing-

(A) one-fifth of the total of the compensation paid under the State unemployment compensation law during the 5-year period ending at the close of the second calendar year preceding such taxable year, by

(B) the total of the remuneration subject to contributions under the State unemployment compensation law with respect to the first calendar year preceding such taxable year.

(6) Rounding.-If any percentage referred to in either subparagraph (B) or (C) of subsection (c)(2) is not a multiple of .1 percent, it shall be rounded to the nearest multiple of .1 percent.

(7) Determination and certification of percentages.-The percentage referred to in subsection (c)(2)(B) or (C) for any taxable year for any State having a balance referred to therein shall be determined by the Secretary of Labor, and shall be certified by him to the Secretary of the Treasury before June 1 of such year, on the basis of a report furnished by such State to the Secretary of Labor before May 1 of such year.

Any such State report shall be made as of the close of March 31 of the taxable year, and shall be made on such forms, and shall contain such information, as the Secretary of Labor deems necessary to the performance of his duties under this section.

(e) Successor employer.-Subject to the limits provided by subsection (c), if-

(1) an employer acquires during any calendar year substantially all the property used in the trade or business of another person, or used in a separate unit of a trade or business of such other person, and immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of such other person, and

(2) such other person is not an employer for the calendar year in which the acquisition takes place, then, for the calendar year in which the acquisition takes place, in addition to the credits allowed under subsections (a) and (b), such employer may credit against the tax imposed by section 3301 for such year an amount equal to the credits which (without regard to subsection (c)) would have been allowable to such other person under subsections (a) and (b) and this subsection for such year, if such other person had been an employer, with respect to remuneration subject to contributions under the unemployment compensation law of a State paid by such other person to the individual or individuals described in paragraph (1).

Aug. 16, 1954, c. 736, 68A Stat. 439; Sept. 13, 1960, Pub.L. 86-778, Title V, §523(b), 74 Stat. 980; Mar. 24, 1961, Pub.L. 87-6, §14(b), 75 Stat. 16; Sept. 26, 1961, Pub.L. 87-321, §1(a), 75 Stat. 683; May 29, 1963, Pub.L. 88-31, §2(b), 77 Stat. 51; Nov. 7, 1963, Pub.L. 88-173, §1(a-c), 77 Stat. 305; Aug. 10, 1970, Pub.L. 91-373, Title I, §142(a), (b), 84 Stat. 707; Jan. 3, 1975, Pub. L. 93-618, Title II, §239(e), 88 Stat. 2025; June 30, 1975, Pub.L. 94-45, Title I, §110(a), Title III, §302, 89 Stat. 239, 243; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §§1903(a)(12), 1906(b)(13)(A), 90 Stat. 1808, 1834; Apr. 12, 1977, Pub. L. 95-19, Title II, §201(a), 91 Stat. 43.

26 U.S.C. §3304

§3304. APPROVAL OF STATE LAWS

(a) Requirements.-The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that-

(1) all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve;

(2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;

(3) all money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section

3305 (b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C. 1104);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that-

(A) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903 (c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices;

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that-

(i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institution

(other than an institution of higher education) to which section 3309(a)(1) applies, compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms,

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services may be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess, and

(iv) with respect to any services described in clause (i) or (ii), compensation payable on the basis of services in any such capacity may be denied as specified in clauses (i), (ii), and (iii) to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively

for the purpose of providing such services to one or more educational institutions, and

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2);

(7) an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year;

(8) compensation shall not be denied to any individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work);

(9)(A) compensation shall not be denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

(B) the State shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under the State law with his wages and employment covered under the unemployment compensation law of other States which are approved by the Secretary of Labor in

consultation with the State unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations. Any such arrangement shall include provisions for (i) applying the base period of a single State law to a claim involving the combining of an individual's wages and employment covered under two or more State laws, and (ii) avoiding duplicate use of wages and employment by reason of such combining;

(10) compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income;

(11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970;

(12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy;

(13) compensation shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such

seasons (or similar periods);

(14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act),

(B) any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation, and

(C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence;

(15) the amount of compensation payable to an individual for any week which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below

zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week;

(16)(A) wage information contained in the records of the agency administering the State law which is necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) for purposes of determining an individual's eligibility for aid or services, or the amount of such aid or services, under a State plan for aid and services to needy families with children approved under part A of title IV of the Social Security Act, shall be made available to a State or political subdivision thereof when such information is specifically requested by such State or political subdivision for such purposes, and

(B) such safeguards are established as are necessary (as determined by the Secretary of Health, Education, and Welfare in regulations) to insure that such information is used only for the purposes authorized under subparagraph (A);

(17) all the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

(b) Notification.-The Secretary of Labor shall, upon approving such law, notify the governor of the State of his approval.

(c) Certification.-On October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) or has with respect to the 12-month period ending on such October 31 failed to comply substantially with any such provision in such subsection. No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2) with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. On October 31 of any taxable year after 1971, the Secretary of Labor shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by reason of the enactment of the Employment Security Amendments of 1970 to be included therein, or has with respect to the 12-month period ending on such October 31, failed to comply substantially with any such provision. On October 31 of any taxable year after 1977, the Secretary shall not certify any State which, after reasonable notice and opportunity for a hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by reason of the enactment of

the Unemployment Compensation Amendments of 1976 to be included therein, or has with respect to the 12-month period ending on such October 31, failed to comply substantially with any such provision.

(d) Notice of noncertification.-If at any time the Secretary of Labor has reason to believe that a State whose law he has previously approved may not be certified under subsection (c), he shall promptly so notify the governor of such State.

(e) Change of law during 12-month period.-Whenever-

(1) any provision of this section, section 3302, or section 3303 refers to a 12-month period ending on October 31 of a year, and

(2) the law applicable to one portion of such period differs from the law applicable to another portion of such period,

then such provision shall be applied by taking into account for each such portion the law applicable to such portion.

(f) Definition of institution of higher education.-For purposes of subsection (a)(6), the term "institution of higher education" means an educational institution in any State which-

(1) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) is legally authorized with such State

to provide a program of education beyond high school;

(3) provides an educational program for it which awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, or offers a program of training to prepare students for gainful employment in a recognized occupation; and

(4) is a public or other nonprofit institution.

Aug. 16, 1954, c. 736, 68A Stat. 443; Aug. 10, 1970, Pub.L. 91-373, Title I, §§104(a), 108(a), 121(a), 131(b)(2), 142(f)-(h), Title II, §206, 84 Stat. 697, 701, 704, 707, 708, 712; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §1903(a)(14), 1906(b)(13)(C), (E), 90 Stat. 1809, 1834; Oct. 20, 1976, Pub.L. 94-566, Title I, §115(c)(1), (5), Title III, §§312(a), (b), 314(a), Title V, §506(b), 90 Stat. 2670, 2671, 2679, 2680, 2687; Apr. 12, 1977, Pub.L. 95-19, Title III, §302(a), (c), (e), 91 Stat. 44, 45; Nov. 12, 1977, Pub.L. 95-171, §2(a), 91 Stat. 1353; Dec. 20, 1977, Pub.L. 95-216, Title IV, §403(b), 91 Stat. 1561.

26 U.S.C. §3306 (c)

(c) Employment.-For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for

the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aricraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3)), except,-

(1) agrigultural labor (as defened in subsection (k)) unless-

(A) such labor is performed for a person who-

(i) during any calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor (not taking into account labor performed before January 1, 1980, by an alien referred to in subparagraph (B)), or

(ii) on each of some 20 days during the calendar year or the preceding calendar year, each day being in a different calendar week, employed in agricultural labor (not taking into account labor performed before January 1, 1980, by an alien referred to in sub-

paragraph (B)) for some portion of the day whether or not at the same moment of time) 10 or more individuals; and

(B) such labor is not agricultural labor performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

(2) domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for a person who paid cash remuneration of $1,000 or more to individuals employed in such domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is $50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if-

(A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business, or

(B) such individual was regularly employed (as determined under subparagraph (A)) by

such employer in the performance of such service during the preceding calendar quarter;

(4) service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft, if the employee is employed on and in connection with such vessel or aircraft when outside the United States;

(5) service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is-

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivision; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301;

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

(9) service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351);

(10)(A) service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521, if the remuneration for such service is less than $50, or

(B) service performed in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance, or

(C) service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its

educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers, or

(D) service performed in the employ of a hospital, if such service is performed by a patient of such hospital;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a non-diplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government-

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an intern in the employ of a hospital by an individual who has completed a 4 years' course in a medical school chartered or approved pursuant to State law;

(14) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission;

(15)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(16) service performed in the employ of an international organization;

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except-

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States); or

(18) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101 (a) (15) of the Immigration and Nationality Act, as amended (8 U.S.C. 1101 (a)(15) (F) or (J)), and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be.

26 U.S.C. §3309

§3309 STATE LAW COVERAGE OF SERVICES PERFORMED FOR NONPROFIT ORGANIZATIONS OR GOVERNMENTAL ENTITIES

(a) STATE LAW REQUIREMENTS. - For purposes of section 3304 (a) (6) -

(1) except as otherwise provided in

subsections (b) and (c), the services to which this paragraph applies are -

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c), and

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c); and

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

(b) SECTION NOT TO APPLY TO CERTAIN SERVICE. - This section shall not apply to service performed -

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by duly ordained, commissioned, or licensed minister of a church in the exercise

of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a governmental entity referred to in paragraph (7) of section 3306(c), if such service is performed by an individual in the exercise of his duties -

(A) as an elected official;

(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

(C) as a member of the State National Guard or Air National Guard;

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

(4) in a facility conducted for the purpose of carrying out a program of -

(A) rehabilitation for individuals who earning capacity is impaired by age or physical or mental deficiency or injury, or

(B) providing remunerative work for individuals who because of their

impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; and

(6) by an inmate of a custodial or penal institution.

(c) NONPROFIT ORGANIZATIONS MUST EMPLOY 4 OR MORE. - This section shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined without regard to section 3306(c) (8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more.

Added Pub.L. 91-373, Title I, §104(b) (1), Aug. 10, 1970, 84 Stat. 697, and amended Pub.L. 94-566, Title I, §115 (a), (b) (c) (2), (3),

26 U.S.C. §3310

§3310 JUDICIAL REVIEW

(a) IN GENERAL. - Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United State Code.

(b) FINDINGS OF FACT. - The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) JURISDICTION OF COURT; REVIEW. - The court shall have jurisdiction to affirm the action of the Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) STAY OF SECRETARY OF LABOR'S ACTION. -

(1) The Secretary of Labor shall not with-

hold any certification under section 3303 (b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) PREFERENCE. - Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

Added Pub.L. 91-373, Title I, § 131(b) (1), Aug. 10, 1970, 84 Stat. 703, and amended Pub. L. 94-455, Title XIX, § 1906(b) (13) (F), (H), Oct. 4, 1976, 90 Stat. 1835.

NEW HAMPSHIRE UNEMPLOYMENT COMPENSATION LAW

RSA 282: 1-H (4)

(4) The term "employment" shall not include:...

RSA 282: 1-H (4) (g)

(g) Service performed in the employ of any state other than this state or of any of political subdivisions of such other state or of any instrumentality of such other state, or of any town, city or other political subdivision of this state unless such town, city or other political subdivision of this state elects to become subject under section 7 of this chapter; (1971, 156:4, effective 4/1/71)

RSA 282: 1-H (4) (q) (r) (s)

(q) Service performed for this state by any individual who is not a classified employee in the state classified service; except that this provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education; (1971, 156:9, effective 1/1/72)

(r) Service performed by seasonal or temporary classified employees as herein defined. Seasonal classification in the state employment classification system shall mean service in a position the need for which may be reasonably anticipated as likely to recur each year for a varying period of time. Temporary classification in the state employment classification system shall mean service of a qualified person to a position that is known to be of limited duration. This provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education. (1971, 156:10, effective 1/1/72)

(s) The following services performed in the employ of an organization described in section 501 (c)(3) and exempt under section 501 (a) of the Internal Revenue Code:

RSA 282: 1-H (4) (s) (1) (2) (3) (4) (5) (6)

(1) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) in the employ of a school which is not an institution of higher education; or

(4) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competative labor market by an individual receiving such rehabilitation or remunerative work; or

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training; or

(6) for a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution. (1971, 156:11, effective 1/1/72)

RSA 282: 1-N (1) (a)

N. "Wages" means every form of remuneration for personal services paid or payable to a person directly or indirectly, by his employing unit, including salaries, commissions, bonuses, and the reasonable value of board, rent, housing, lodging, payment in kind and similar advantages estimated and determined in accordance with the rules of the commissioner of the department of employment security. (1977, 441:6 effective 1/1/78)

(1) The term "wages" shall not include:

(a) The amount of any payment to an alien unless said individual was, at the time he performed services, in the United States of America under color of law. (1977, 441:12, effective 1/1/78)

RSA 282: 1-O

O. "Annual earnings" shall be the wages, to the nearest dollar, earned during each base period from an employer by an individual in employment in New Hampshire and an amount equivalent to the average weekly wage, as determined under the New Hampshire Workmen's Compensation statute, for each week that an individual has been found by either the labor commissioner or a court to be entitled to receive workman's compensation based on a claim involving such an employer. Annual earnings shall be reduced by all wages for services

in training preparation to participate or participation in sports or athletic events with respect to any weekly benefit amount for a week of total or partial unemployment during the period between successive sport seasons for any individual so engaged in the first of such seasons if there is a reasonable assurance of such performance in the second. Services as parking lot attendants, ushers, ticket sellers, and cafeteria workers shall be excluded from this provision. (1977, 441:7, effective 1/1/78)

Supreme Court, U. S.
FILED
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No. 79-1846

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
AND THE STATE OF NEW HAMPSHIRE,
APPELLANTS

v.

F. RAY MARSHALL,
SECRETARY OF LABOR, AND THE
UNITED STATES DEPARTMENT OF LABOR

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO DISMISS

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DEPARTMENT OF EMPLOYMENT SECURITY,
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v.

F. RAY MARSHALL,
SECRETARY OF LABOR, AND THE
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO DISMISS

QUESTIONS PRESENTED

1. Whether the Secretary of Labor correctly concluded that New Hampshire's unemployment compensation law fails to conform to the requirements of the Federal Unemployment Tax Act.

2. Whether Congress may condition the availability of certain federal unemployment tax credits and grants of money upon the state's provision of unemployment compensation coverage for the employees of the state and its political subdivisions.

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Pursuant to Rule 16 of the Rules of this Court, the Solicitor General, on behalf of the appellees, moves that the appeal be dismissed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App.) is reported at 616 F.2d 240. The decision of the Secretary of Labor (J.S. App.) is unreported. The recommended decision of the administrative law judge, which is incorporated by reference in substantial part in the decision of the Secretary, is not reported (App. C, *infra*, 5a–52a).

JURISDICTION

The decree of the court of appeals was entered on February 20, 1980 (App. B, *infra*, 3a–4a). The notice of appeal was filed on May 21, 1980 (App. D, *infra*, 53a–55a).[1] The jurisdictional statement was filed on May 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

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[1] The appendix to the jurisdictional statement does not include the court of appeals' corrections to its opinion, the decree of the court of appeals, the recommended opinion of the administrative law judge, or the notice of appeal. We have therefore set forth those items reproduced as Appendices A, B, C, and D, *infra*. Moreover, because the appendix to the jurisdictional statement is not paginated, our references to the documents included in that appendix are to such documents as separately paginated.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The relevant provisions of the Internal Revenue Code (26 U.S.C.) are set forth in J.S. App.

STATEMENT

This case arises under the Federal Unemployment Tax Act of 1954 ("FUTA"), Sections 3301 through 3311 (26 U.S.C.) (J.S. App.). The statutory provisions at issue in this case operate as follows: Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds to conform to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31st. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and federal grants of money.

Section 3301 presently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304* * *" (26 U.S.C. 3302(a)(1)). Thus, if the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year.

An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide, for example, job finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94–566, 90 Stat. 2670–2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Statutes Involved 10–14, 27–28) to require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same

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[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1), (c), and (d)(1).

[5] See Sections 301–303 of the Social Security Act, 42 U.S.C. 501–503.

[6] See Sections 1–12 of the Wagner-Peyser Act, ch. 49, 48 Stat. 113–117, 29 U.S.C. 49–49k.

terms and conditions as state law covers private employees. These amendments apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

By letters dated February 24, 1978, the Secretary notified the Governor of New Hampshire and the Commissioner of the New Hampshire Department of Employment Security that he had serious questions as to whether New Hampshire's Unemployment Compensation Law, 2-D N.H. Rev. Stat. Ann. ch. 282 (1977 repl. ed.), conformed to the federal requirements set forth in Code Section 3304(a). A hearing on those questions was held on September 14 and 15, 1978, in Washington, D.C., before an administrative law judge.

Six requirements of Section 3304(a) were in dispute. All of these requirements for certification had been added to FUTA by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. The six issues, which relate to the 12-month period ending October 31, 1978, were as follows:[7]

1. Whether the New Hampshire Unemployment Compensation Law extended coverage to the employees of the State and its political subdivisions. See Sections 3304(a)(6)(A), 3309(a) (1) and 3306(c)(7).

2. Whether New Hampshire extended coverage to employees of non-profit schools which are not institutions of higher learning. See Sections 3304(a)(6)(A), 3309(a)(1) and 3306(c)(8).

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[7] See App. C, *infra*, 7a-12a.

3. Whether New Hampshire granted political subdivisions the option of reimbursing the state for unemployment benefits paid to their former employees, in lieu of making contributions to the state in the manner of private employers. See Sections 3304(a)(6)(B) and 3309(a)(2);

4. Whether New Hampshire provided for the determination of the eligibility of aliens for benefits by requiring data with respect to alien status uniformly from all applicants for benefits and by basing determinations of alien status upon a preponderance of the evidence. See Section 3304(a)(14)(B) and (C).

5. Whether, contrary to FUTA, New Hampshire permitted benefits to be paid to certain professional athletes during the period between sports seasons. See Section 3304(a)(13).

6. Whether New Hampshire provided for benefits for employees of educational institutions between academic years or terms, and during vacation periods or recesses. See Section 3304(a)(6)(A).

In addition to the foregoing six issues concerning conformity with FUTA, New Hampshire claimed that Congress could not constitutionally condition the availability of the tax credits and grants on a state's providing unemployment compensation coverage for state and local government employees.[8]

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[8]Only the first of the FUTA conformity issues directly implicated this constitutional question; also, the third disputed conformity requirement (the option of local governments to reim-

The administrative law judge found that New Hampshire's unemployment compensation law did not satisfy the FUTA requirements in each of the six respects urged by the Department of Labor. He also made findings of fact respecting the constitutional question. However, he did not rule on the constitutionality of the federal statute because he had no authority to do so (App. C, *infra*, 12a–13a).

On October 30, 1978, the Secretary issued his decision. He upheld the administrative law judge on the FUTA conformity issues, finding that "the New Hampshire Unemployment Compensation Law fails to conform to the provisions of the Federal Unemployment Tax Act, as amended, with respect to each of the six numbered issues * * * listed in the Notice of Hearing * * *." The Secretary also found that the findings of fact bearing on the constitutional question were supported by the evidence, and, with certain modifications, the Secretary adopted such findings (Decision 26–27).

On New Hampshire's appeal, the court of appeals sustained the Secretary's decision.[9] New Hampshire conceded in the court of appeals that its unemployment compensation law did not conform to the six FUTA requirements (Opinion 6–7). After review of the evidence respecting those requirements, the court upheld the Secretary's decisions "that New Hampshire's Un-

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burse the state fund) would become moot if the constitutional issue were resolved in favor of the state.

[9]The court of appeals granted a stay of the Secretary's decision, "pending resolution of the petition for review." That stay expired upon entry of the court's judgment.

employment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendments to FUTA" (Opinion 7–9). Although the court noted that, at most, only two of the six conformity issues implicated New Hampshire's Tenth Amendment issue, it nevertheless addressed the constitutional question. Following *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the court ruled that the FUTA tax credits are not coercive but are a legitimate condition for federal funding. As the court stated (Opinion 14), "Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program." The court concluded that the 1976 Amendments to FUTA were not barred by either the Tenth Amendment or this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), because the states are not compelled to participate in the federal benefits program (Opinion 13–15).

ARGUMENT

1. This appeal should be dismissed for lack of jurisdiction. The applicable jurisdictional statute, 26 U.S.C. 3310(c),[10] provides: "The judgment of the court [of appeals] shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the

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[10] See, generally, S. Rep. No. 91–752, 91st Cong., 2d Sess. 6, 26, 54 (1970). Under Section 3310, moreover, only the state is entitled to seek review. The Department of Employment Security, an autonomous agency, is not.

United States Code." There is accordingly no right of appeal under Section 3310(c).

Nor is appeal authorized under 28 U.S.C. 1254(2). That provision allows an appeal only where a state statute is held "to be invalid as repugnant to the Constitution, treaties or laws of the United States." The court below did not so rule. All that the decision in this case holds is that New Hampshire's unemployment compensation law does not satisfy the conditions for availability of federal credits and grants that are set forth in Section 3304(a), and that such conditions are constitutional. New Hampshire therefore has no right of appeal under 28 U.S.C. 1254(2).

2. Treating the appeal as a petition for a writ of certiorari (28 U.S.C. 2103), the petition should be denied. The only issue that appellants present for review is the constitutionality of the requirement of FUTA that New Hampshire provide unemployment coverage to state and local government employees as a condition for participation in the federal tax credit and benefit programs. But four of the six conformity issues resolved against New Hampshire do not even implicate the Tenth Amendment. Thus, even if the constitutional issue were resolved in appellants' favor, the Secretary's denial of certification would be upheld on independent statutory grounds.

3. The court of appeals correctly rejected appellants' Tenth Amendment challenge to the 1976 Amendments to the Federal Unemployment Tax Act. Its reasoning was recently adopted by the District of Columbia Circuit in a case raising the same constitutional objection. *County of Los Angeles* v. *Marshall*, Nos. 77–2138,

78–1142, 78–1232, 78–1275 and 78–1311 (Mar. 19, 1980), petition for certiorari pending,[11] No. 79–1965.

a. The enactment in 1935 of the Social Security Act established the federal-state unemployment compensation system. The basic statutory system was described in this Court's decision in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), which upheld its constitutionality under Article I, Section 8, the Due Process Clause, and the Tenth Amendment of the Constitution. The basic system remains in effect today.

Stripped to its essentials, appellants' suit attempts to resuscitate the FUTA tax coercion question that was resolved by the Court in *Steward Machine Co.* There, the Court held (301 U.S. at 585) that the FUTA tax "is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." Petitioners advance the identical arguments rejected in *Steward Machine Co.* For example, the employer in that case argued that the FUTA tax was only a "pretext to provide this plan for unemployment," and was a "tax club * * * sufficient to drive the States into line"; that "Congress was not seeking taxes for the Treasury * * * [but] was providing a plan for unemployment," and that the states were coerced because otherwise "their citizens are compelled to supply millions of dollars to be used for the administration of agencies in other States that submit." (Summary from petitioner's brief, 301 U.S. at 551–553.)

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[11] Because of the similarity in subject matter, we are serving upon Appellants a copy of our brief in opposition in that case.

But in *Steward Machine Co.*, the Court rejected the argument that the purpose of the statute was "to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government" (301 U.S. at 587). Appellants' identical argument that the FUTA is unconstitutionally coercive is therefore foreclosed by *Steward Machine Co.*[12] As the Court observed, in terms that govern this case as well (301 U.S. at 589–590; citation omitted):

> The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." * * * In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that

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[12] *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), upon which appellants rely (J.S. 29), does not support their claim. There, the Court held that a New Hampshire income tax violated the Privileges and Immunities Clause because it was imposed only on nonresidents who worked within the state. Nothing in that case bears upon the constitutionality of a federal tax, such as FUTA, which is uniformly applied in all states.

such a concept can ever be applied with fitness to the relations between state and nation.[13]

In *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525–526 (1937), decided the same Term as *Steward Machine Co.*, the Court similarly upheld the constitutionality of the Unemployment Compensation Act of Alabama, stating that the federal unemployment compensation program "is not coercive in its operation."[14] Finally, as recently as two Terms ago, the Court described the current national unemployment scheme as "federal involvement primarily through *tax incentives* to encourage state-run programs" (emphasis supplied). *New York Tel. Co.* v. *New York Labor Dep't*, 440 U.S. 519, 537, n.28 (1979) (quoting from *Ohio Bureau* of Employment Services v. *Hodory*, 431 U.S. 471, 483 (1977)).

It is therefore settled beyond serious question that the FUTA credit does not operate coercively upon the states. In so arguing, we do not suggest that the credit, and the several other substantial benefits to the

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[13]The FUTA tax credit was modeled after the former federal estate tax credit (up to 80% of the federal tax) for payment of state inheritance taxes. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). The Court upheld that credit against the charge that it coerced Florida into enacting an inheritance tax and injured that State by inducing potential taxpayers to withdraw property from the State. *Florida* v. *Mellon*, 273 U.S. 12, 17–18 (1927). Cf. Section 2011 of the Internal Revenue Code of 1954 (26 U.S.C.).

[14]See also *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 310 (1943), noting that the federal unemployment tax "from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the field of unemployment insurance."

states that arise from participation in the federal-state unemployment compensation system,[15] do not present an attractive incentive. A tax credit that diverts billions of dollars of federal revenue to the states may be too attractive to decline. That fact, however, does not create an unconstitutional coercion. Tax incentives do not become penalties simply by reason of their attractiveness.

b. Nor is there any unconstitutional coercion involved in the provisions of the 1976 Amendments to FUTA that require unemployment coverage for state and local government employees as a condition for receiving the tax credits and grants. These conditions were enacted for the same compelling economic and social reasons that gave rise to the original federal unemployment legislation in the 1930's, *viz.*, the need to relieve the burdens of unemployment. The conditions at issue thus stand on the same footing as the state requirements imposed in the original federal unemployment compensation program upheld in *Steward Machine Co.* and *Southern Coal Co.*

The court of appeals therefore correctly concluded that the 1976 Amendments represent Congress' determination that coverage of state and local government employees is an "end legitimately national,"[16] an essential means for combating the national economic, fiscal, and social consequences of unemployment (Opinion 11–14). By 1976, 7.7 million state and local

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[15] See *State of New Hampshire Dep't of Employment Security* v. *Marshall*, *supra*, 616 F.2d at 246–247 n.10.

[16] See *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 590–591.

government workers did not have unemployment coverage. These employees constituted the largest group of workers not covered by the regular system.[17] Two years earlier Congress had established the Special Unemployment Assistance Program,[18] which provided unemployment benefits for individuals generally not covered under state laws. Congress fully funded this program, and thereby provided hundreds of millions of dollars of direct federal grants to unemployed state and local government employees.[19]

In addition to these special benefits, Congress has expended additional hundreds of millions of dollars under the regular FUTA program to assist state governments. For example, in fiscal 1977 alone, the federal government paid more than $1.5 billion in direct grants to states for the administration of unemployment compensation programs and local public employment offices.[20] As of February 1, 1978, moreover, more than $4.9 billion in interest-free federal loans to states, for payment of unemployment benefits, were outstanding.[21]

Given these substantial federal grants both to state governments and unemployed state and local govern-

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[17] S. Rep. No. 94-1265, 94th Cong., 2d Sess. 8 (1976).

[18] Emergency Jobs and Unemployment Assistance Act of 1974, Title II, Pub. L. No. 93-567, 88 Stat. 1845, 1850.

[19] See H.R. Rep. No. 93-1528, 93d Cong., 2d Sess. (1974).

[20] *Dep'ts of Labor and Health, Education, and Welfare Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess. (Pt. 1) 191 (1978) (hereinafter "*House Hearings*").

[21] *House Hearings, supra*, at 168-169.

ment employees, there is no basis for petitioners' contention that the statutory condition requiring the extension of unemployment coverage to state and local government workers is an unrelated federal charge upon the state or its citizens, or is an impermissible federal regulation of the states. The federal government has spent billions of dollars in a federal-state cooperative program to combat unemployment. State coverage of state and local government workers is necessary to the success of that program, and a reasonable condition for participation in the program's enormous federal benefits.

c. Since the Federal Unemployment Tax Act is not a federal mandate imposed upon the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), has no bearing upon this case. *National League of Cities* involved the mandatory extension of federal minimum wage and maximum hour requirements to employees of state and local governments. The Court held that these mandatory requirements abridged the Tenth Amendment rights of the states. As the Court stated (426 U.S. at 852; footnote omitted): "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl.3." Thus, *National League of Cities* addresses only the use of the federal commerce power[22] "to directly displace" traditional state

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[22]This Court confined the rationale of *National League of Cities* to Commerce Clause powers. It stated (426 U.S. at 852 n.17):

government functions. It has no application to federal programs undertaken, at the option of the states, in response to federal incentives. A state either may accept the federal conditions, and thereby receive the statutory benefits, or it may decline to participate. An unbroken line of decisions of this Court has held such "conditional" federal benefit statutes to be constitutional. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143–144 (1947).[23]

The foregoing analysis was recently upheld in *State of North Carolina ex rel Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978). That case involved federal assistance to North Carolina under 42 health assistance programs. A principal requirement for such assistance was that the state establish a health agency to administer a certificate of need program for new institutional health services. But North Carolina's highest court had ruled that, under the state constitution, a certificate of need statute was beyond the power of the state legislature. Accordingly, North Carolina challenged such a requirement as an unconstitutionally coercive effort to require the state to amend its con-

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We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

[23] See also *City of New York* v. *Richardson*, 473 F.2d 923, 928 (2d Cir.), cert. denied, 412 U.S. 950 (1973).

stitution. The three-judge district court rejected the argument, ruling that the requirement was a condition of federal assistance, and therefore was not coercive. As the court stated (445 F. Supp. at 535–536): "It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland* v. *Environmental Protection Ag., supra,* 530 F.2d at 215, it does not impose a mandatory requirement to enact legislation on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance" (emphasis in original).[24]

CONCLUSION

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, it is respectfully submitted that the petition should be denied.

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LEONARD J. HENZKE, JR.
ROBERT T. DUFFY
Attorneys

AUGUST 1980

[24]The court also distinguished (445 F. Supp. at 536 n.10) *National League of Cities* on the ground that it involved both direct regulation of the states and the Commerce Clause.

APPENDIX A

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Dana H. Gallup
Clerk

1602 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109
(617) 223-2888

March 10, 1980

To West Publishing Company, Commerce Clearing House, National Center for Automated Information Retrieval, Lawyers Weekly, and All Counsel

Re: 78-1564 State of New Hampshire Department of Employment Security, et al. v. The Honorable F. Ray Marshall, Secretary of Labor of the United States, and The United States Department of Labor

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Gentlemen:

Please make the following corrections in the above captioned opinion which was released on February 20, 1980.

On page 12, footnote 8, last line, the word "employees" should be changed to, "employers."

On page 13, footnote 10, eight lines from the top, the figure "$9,000,000" should be changed to "$900,000,000."

Very truly yours,
DANA H. GALLUP, CLERK.
By /s/
FRANCIS P. SCIGLIANO
Chief Deputy Clerk

FPS: mn

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1564.

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, ET AL., PETITIONERS,

v.

THE HONORABLE F. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES; AND THE UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS.

DECREE
Entered February 20, 1980

This cause came on to be heard upon petition for review of the decision of the Secretary of Labor of the United States

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The petition for review is denied, and

The order of this Court dismissing Los Angeles County as a named petitioner in this case is reaffirmed for lack of jurisdiction under 28 U.S.C. Sec. 3310(a).

By the Court:

/s/ _____

DANA H. GALLUP
Clerk

A True Copy

Attest

/s/_____

DANA H. GALLUP
Clerk

[Cert. cc: Secretary of Labor, and Messrs. Smith, Rhyne, Tobin, Kaufmann, Morris, Kohn and Ferguson.]

APPENDIX C

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

U.S. DEPARTMENT OF LABOR

v.

STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

CONFORMITY PROCEEDINGS

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Before: ROBERT G. MAHONY
Administrative Law Judge

RECOMMENDED DECISION

Pursuant to a Notice of Hearing issued by the Secretary of Labor on June 15, 1978 the State of New Hampshire Department of Employment Security (NHDES) was afforded the opportunity for a hearing on the general question of whether the State of New Hampshire has amended its Unemployment Compensation Law: (1) so that it contains, effective January 1, 1978, each of the provisions required to be contained therein by reason of the enactment of the Unemployment Compensation Amendments of 1976 (Public Law 94-566, approved October 20, 1976; 90 Stat. 2667, *et seq.*) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (Public Law 95-19, approved April 12, 1977; 91 Stat. 39, 43, *et seq.*); and (2) so that it no longer contains the provisions specified in section 3304(a) of the Internal Revenue Code of 1954, 26 U.S.C. 3304(a). The purpose of these amendments is to extend Unemployment Com-

pensation Insurance coverage to employees of states and political subdivisions and certain other employees.

The Unemployment Compensation Law of the State of New Hampshire must be determined by the Secretary of Labor, by October 31, 1978, to be in conformity with the requirements of the Federal Unemployment Tax Act (FUTA) in order to be certified under section 3304(c) of FUTA and thereby to have that State receive the benefits for itself and its inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501–504, and FUTA.

The hearing was originally set for July 13, 1978. At the request of NHDES, it was continued until July 27, 1978 by the Administrative Law Judge. It was again rescheduled by the Secretary at the request of NHDES until September 14, 1978 at which time the parties were afforded the opportunity to examine witnesses and introduce documentary evidence. Timely briefs, proposed findings of fact and conclusions of law, have been filed by the parties.

Issues

The issues to be decided in this case as set out in the Notice of Hearing are:

1. Whether, in view of the exemptions from coverage in sections 282:1,H(4)(g) and 282:1,H,(4)(q) of the New Hampshire Unemployment Compensation Law, the New Hampshire law has been amended so that services performed in the employ of the State of New Hampshire and in the employ of its political subdivisions are covered by the New Hampshire law, effective January 1, 1978, as is required by sections

3304(a)(6)(A) and 3309(a)(1) of the Internal Revenue Code of 1954, as amended by section 115 of Public Law 94-566.

2. Whether, in view of RSA 282:1,H(4)(s)(3), which provides for an exemption from coverage of services performed in the employ of a nonprofit school which is not an institution of higher education, the New Hampshire Unemployment Compensation Law has been amended to cover such services, effective January 1, 1978, as is required by sections 3304(a)(6)(A) and 3309(a)(1) of the Internal Revenue Code of 1954, as amended by section 115 of Public Law 94-566.

3. Whether the New Hampshire Unemployment Compensation Law has been amended, effective January 1, 1978, to conform with the requirements of sections 3304(a)(6)(B) and 3309(a)(2) of the Internal Revenue Code of 1954, as amended by section 506 of P.L. 94-566 and Section 302 of P.L. 95-19 (relating to an option to elect to make payments in lieu of contributions) with respect to governmental entities and nonprofit organizations which are required by section 3304(a)(6)(A) and 3309(a)(1) of such Code to be covered by the New Hampshire law.

4. Whether, in view of the provisions of RSA 282:1,N,(1)(a), and/or the provisions of RSA 282:1,O, which exclude from the definition of wages amounts paid to any alien unless such person was, at the time he performed services present in the United States under code of law, the New Hampshire Unemployment Compensation Law has been amended so that it contains the provisions required to be contained therein by section 3304(a)(14) of the Internal Revenue Code of

1954, as enacted by section 314 of P.L. 94-566 and amended by section 302 of P.L. 95-19, and so that it no longer contains the provisions required by section 3304(a)(9)(A) of such Code, as enacted by section 121 of P.L. 91-373, in the following respects:

(a) Whether such law has been amended effective January 1, 1978, so that it contains the provisions required to be contained therein by section 3304(a)(14) of the Internal Revenue Code of 1954 (relating to denial of compensation to aliens other than specified classes of aliens and establishing certain standards to procedure and weight of evidence sufficient to support denial of compensation), since the State law provisions do not contain standards of procedure or weight of evidence to be used in applying the provisions, as is required by section 3304(a)(14)(B) and (C) of such Code; and

(b) Whether such law has been amended, effective January 1, 1978, so that it no longer contains the provisions required by section 3304(a)(9)(A) of the Internal Revenue Code of 1954 (relating to denial or reduction of compensation to an individual solely because he filed a claim in another State, or a contiguous country with which the United States has an agreement with respect to unemployment compensation, or because he resides in another State or such contiguous country at the time he files a claim for unemployment compensation), since the State law provides for the denial of or reduction in compensation to such an individual because he files a claim for compensation in a contiguous country with which the United States has an agreement with respect to unemployment compensation or

because he resides in such a contiguous country at the time he files a claim for compensation.

5. Whether section 282:1,O of the New Hampshire Unemployment Compensation Law, which provides for the disregard of wages earned in training, preparation to participate or participation, in sports or athletic events, has been amended, effective January 1, 1978, so that it contains the provisions required by section 3304(a)(13) of the Internal Revenue Code of 1954, as enacted by section 314 of P.L. 94-566 (which provides that compensation shall not be payable on the basis of services substantially all of which consist of participating in sports or preparing or training to so participate for any week which commences between sport seasons or similar periods under specified conditions) in the following respect: Whether RSA 282:1,O authorizes or requires the use of wages to establish a claim based upon services intended to be excluded by virture of the substantiality test of section 3304(a)(13).

6. Whether section 282:3,F of the New Hampshire Unemployment Compensation Law, which requires the denial of compensation to any school employee in any week in which the educational institution is on a break if such person has a contract to perform or a reasonable assurance that after the break he will perform professional or nonprofessional service in any such institution, has been amended so that it conforms with section 3304(a)(6)(A) of the Internal Revenue Code of 1954, as amended by section 104(a) of P.L. 91-373, section 115 of P.L. 94-566, and section 302 of P.L. 95-19, in the following respects:

(a) Whether such law, which has been amended so as to contain for the period prior to January 1, 1978, a provision which denies compensation to individuals performing services in the employ of nonprofit and State institutions of higher education in capacities other than professional (i.e., instructional, research, or principal administrative capacities) between successive and non-successive academic years or terms, and which denies compensation to individuals performing services in either professional to other than professional capacities during a period when such institutions of higher education are not in session, no longer contains for such period the provisions required by section 3304(a)(6)(A) of such Code;

(b) Whether, with respect to section 3304(a)(6)(A) and clauses (i) and (ii) of such Code, as amended by section 115 of P.L. 94-566 and section 302 of P.L. 95-19, the New Hampshire law has been amended effective January 1, 1978, so that it no longer contains the provisions required by subparagraph (A) and clause (i) or so that it contains provisions which do not conform to subparagraph (A) and clause (ii) because of: (1) denial of compensation to employees of institutions of higher education performing services in capacities other than professional (i.e., instructional, research, or principal administrative capacities); (2) denial of compensation to employees of educational institutions when they move from professional to other than professional employment, and vice versa; and (3) denial of compensation to other than professional employees of educational institutions during non-successive academic years and/or terms; and

(c) Whether, with respect to section 3304(a)(6)(A) and clause (iii) of such Code, as enacted by section 302 of P.L. 95–19, the New Hampshire law has been amended effective January 1, 1978, so that it contains provisions which do not conform to subparagraph (A) and clause (iii) because of: (1) denial of compensation to employees of educational institutions during a period other than an established and customary vacation period of holiday recess; and (2) denial of compensation to individuals who perform services in other than an professional capacity in the employ of an institution of higher education.

In addition to introducing evidence in the above conformity issues, the parties, under the Rules of Procedure for this case, were also afforded the opportunity to introduce evidence on the issue of the constitutionality *vel non* of the 1976 amendments to FUTA.

The New Hampshire Department of Employment Security maintains that the Secretary and the Administrative Law Judge as his designee must make conclusions of law on constitutional issues. This position is based upon the revised Rules of Procedure which were issued on August 15, 1978 setting the hearing date for September 14, 1978. The original Rules of Procedure stated *inter alia* " . . . no conclusion of law regarding the constitutionality or unconstitutionality of any Federal statute(s) are to be made . . ." This language, in essence, was omitted in the revised Rules. Since the omission was obviously the result of a typographical error, in the revised Rules of Procedure, I do not deem it material to the conduct of these proceedings so as to permit NHDES to validly claim prejudice or sur-

prise. This omission was corrected by the Secretary on September 14, 1978 (43 F.R. 42048, September 19, 1978). In any event, it is settled that neither the Secretary nor his designee may decide constitutional issues. *Oestereich* v. *Selective Service Board* 393 U.S. 233, 242 (1968). (Harlan, J., concurring). Therefore, since the Rules of Procedure permit evidence bearing on the constitutionality of the 1976 Amendments, and, since the parties have offered such evidence, findings of fact but no conclusions of law will be made on these issues.

Based upon my review of the entire record in this case, including my observation of the witnesses as well as the briefs and proposed findings of fact and conclusions of law, I make the following:

Finding of Fact and Conclusions of Law on the Issues of Conformity

1. From on or about October 21, 1976 thru on or January 24, 1978, the U.S. Department of Labor and State of New Hampshire Department of Employment Security engaged in communications, orally and in writing which concerned Amendments to the New Hampshire Unemployment Compensation law to make it conform to FUTA.

2. By letter dated October 5, 1977 from Luis Sepulveda, Regional Administrator for Employment and Training, to Mr. Benjamin C. Adams, Commissioner, NHDES, NHDES was advised of seven items that DOL found deficient in proposed legislation (HB 1143) to implement P.L. 94-566. Those items were described as (1) coverage of governmental entities, (2)

exculsion from coverage of governmental entities, (3) financing option of political subdivisions, (4) coverage of nonprofit elementary and secondary schools, (5) denial of benefits to athletes, (6) between terms denial, and, (7) denial of benefits to aliens. NHDES was further advised that corrective amendments had to be enacted by January 1, 1978, and, if not, the Secretary of Labor is required, pursuant to Section 3304(c) of FUTA to notify the Governor that there is reason to believe the state will not be certified for tax credit. NHDES was advised that if corrective legislation is not enacted in 1977, it will be necessary for the Secretary to issue by January 31, 1978 a notice of opportunity for hearing to the agency, pursuant to section 3304(c) of the FUTA. The hearing would be on the question of whether the State has failed to amend its law so that it contains each of the provisions, required by reason of the enactment of the Unemployment Compensation Amendments of 1976, to be included therein.

3. NHDES did not respond to the DOL letter of October 5, 1978.

4. The Secretary of Labor, by letter dated February 24, 1978 advised NHDES that he had serious questions as to whether the State of New Hampshire has amended its Unemployment Compensation Law so that it contains each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 (P.L. 94-566) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (P.L. 95-19) to be included therein. NHDES was also advised that the Secretary had seri-

ous questions as to whether the State of New Hampshire has amended its law so that it no longer contains each of the provisions required by reason of the enactment of Public Law 91–373 to be included therein.

5. The Secretary advised that the basis for questions as to whether the State law contains provisions, required by Public Law 94–566, Public Law 95–19, and Public Law 91–373, as conditions for credit against the Federal unemployment tax, could be identified as follows:

1. (a) The New Hampshire Unemployment Compensation Law does not provide for coverage of all services performed in the employ of the State and its political subdivisions, effective on January 1, 1978, as required by sections 3304(a)(6)(A) and 3309(a)(1), FUTA.

(b) The State law does not contain specific authorization effective on January 1, 1978, allowing governmental entities to elect to finance unemployment benefit costs either by paying contributions or by reimbursing the State unemployment Fund for benefits paid, as required by sections 3304(a)(6)(B) and 3309(a)(2), FUTA.

(c) The State law does not provide for coverage, effective on January 1, 1978, of services performed for nonprofit schools which are not institutions of higher education, as required by sections 3304(a)(6)(A) and 3309(a)(1), FUTA.

(d) The State law does not provide for denial of unemployment benefits, effective on January 1, 1978, to certain aliens under circumstances described in subparagraph (A) of section 3304(a)(14), FUTA, or contain the provision specified in subparagraphs (B) and (C) of section 3304(a)(14). The

State law does not ensure, on the other hand, that benefits will not be reduced or denied a claimant solely because he filed a claim or resides in another State or Canada, as required by section 3304(a)(9)(A), FUTA.

(e) The State law permits the use of wages earned in non-sport services beginning January 1, 1978, as the basis for paying benefits to a professional athlete during the off-season without regard to whether substantially all the individual's services were performed in sport activities, contrary to the requirement of Section 3304(a)(13), FUTA.

(f) The State law provides for denial of benefits, effective July 1, 1977, to employees of educational institutions in circumstances under which section 3304(a)(6)(A), FUTA, requires that such individuals be paid benefits under the same terms and conditions that apply to other workers.

6. By letter dated June 6, 1978, the Secretary again advised NHDES *inter alia* of areas of alleged deficiencies of the New Hampshire Unemployment law in order to conform to P.L. 94–566.

7. The Secretary of Labor issued a formal Notice of Hearing and Rulings of Procedure to govern this proceeding on June 13, 1978 (43 F.R. 26500, June 20, 1978. Revised rules were published on August 18, 1978 (42 F.R. 36721) in order to accommodate a postponement of the hearing date requested by NHDES; a correction to the Revised Rules was published September 19, 1978 (43 F.R. 42048).

Coverage of Public Employees Under Existing New Hampshire Law

8. Since 1957, the State of New Hampshire has provided full unemployment insurance coverage for its

permanent classified civil service employees; State employees not covered are temporary and seasonal workers, as well as those few not in classified service.

9. Data submitted by NHDES shows that as of January 1, 1978, all but 2,370 of the State's 15,600 employees were covered by unemployment insurance. Those employees excluded from coverage were in classes of employment for which there is no expectation of permanency.

10. All employees of State hospitals and institutions of higher education have been covered since 1972 in conformance with Federal requirements of P.L. No. 91–373.

11. Since 1957, New Hampshire law has permitted local governments to elect to cover their employees. Only one such local government, the City of Dover, so elected as to a selected group of its employees.

12. Despite the availability of elective coverage by local governments under State law, employees of local governments have not sought the benefit of such coverage in the course of collective bargaining and negotiation.

13. The present New Hampshire public sector unemployment compensation program has provided unemployment benefits to permanent employees without forcing New Hampshire's unemployment program into the debt.

14. Of the 33,218 employees of New Hampshire local governments in October 1977, only some 702 employees of the City of Dover were covered under the State's unemployment compensation program.

15. The 1976 Amendments require that the States extend unemployment insurance coverage to virtually all employees of State and local government, on the same terms and conditions as coverage is provided to employees of employers in the private sector.

16. Failure of a State to amend its law to provide the public employee coverage required to conform with the 1976 Amendments would result in the State's private employers losing the FUTA tax credit and having to pay FUTA taxes at a rate of 3.4%. None of these revenues could be used in support of the nonconforming State's private sector unemployment compensation program.

17. Such a loss of the FUTA tax credit would be retroactive to the beginning of the applicable year, here 1978.

18. To conform with the 1976 Amendments, the States must also forward all monies paid by State and local governments as employers toward financing of unemployment insurance coverage to the Secretary of the Treasury immediately upon receipt.

a. Such monies may not be retained and invested by officers of the State.

b. Instead, such monies must be retained, disbursed, and invested in securities of the United States by the Secretary of the Treasury in accordance with Federal Law.

Findings as to Conformity of New Hampshire Law to Federal Requirements

19. Sections 3304(a)(6)(A), 3309(a)(1), and 3306(c)(7) of FUTA, when read together, require a state to cover for benefit purposes, effective January 1, 1978, state

and political subdivision employees, with certain limited exceptions stated in sections 3309(b) and 3306(c), under its state unemployment compensation law. The NHUCL has not been amended to provide this coverage effective on January 1, 1978, since sections 282:1, H(4)(g) and (q) of the NHUCL exclude from the definition of "employment" service performed in the employ of (1) political subdivisions (absent an election of coverage pursuant to section 282:7), and (2) the state (if the individual is not a classified employee in the state classified service) except with respect to services performed in the employ of a state hospital and/or an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon such person's annual earnings in "employment" (RSA 282:1,O).

20. Sections 3304(a)(6)(A), 3309(a)(1)(A) and 3306(c)(8) of FUTA, when read together, require a state to cover for benefit purposes, effective January 1, 1978, employees of nonprofit schools below the level of institutions of higher education under its state unemployment compensation law. The NHUCL has not been amended effective January 1, 1978, to provide this coverage since section 282:1,H(4)(s)(3) of the NHUCL expressly excludes from the definition of "employment" service performed in the employ of a school which is not an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon his annual earnings in "employment" (RSA 282:1,O).

21. Sections 3304(a)(6)(B) and 3309(a)(2), when read together, require that a state unemployment compen-

sation law must, effective January 1, 1978, at minimum, afford the governmental entities (which are required by § 3304(a)(6)(A) to be covered by the state unemployment compensation law) the option of electing to pay contributions or to make payments in lieu of contributions (i.e., reimbursements). The NHUCL has not been amended, effective January 1, 1978, to offer such choice to governmental entities. Section 282:6, A–2 of the NHUCL applies only to political subdivisions electing coverage.

22. The NHUCL has not been amended, effective January 1, 1978, to conform to the requirements of section 3304(a)(14)(B) and/or (C) of FUTA since NHUCL:

(a) does not expressly provide for the uniform collection form all applicants for compensation of any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status;

(b) the NHUCL does not expressly provide that in the case of an individual whose application for compensation would otherwise be approved, no determination by the state agency that compensation of such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

23. Section 282:1,O of the NHUCL is not in conformity with the requirements of § 3304(a)(13) of FUTA since the state law permits the use of non-sport wages with respect to a weekly benefit amount during the period between sport seasons even though the sport services constitute substantially all of the services performed by the individual during his base period.

Section 3304(a)(13) requires that a state unemployment compensation law provide, effective January 1, 1978, that under such circumstances compensation shall not be payable to such individual on the basis of any services.

23(a) Clause (i) of the currently effective section 3304(a)(6)(A) of FUTA requires the denial of benefits "between terms" to employees of educational institutions who performed services in a *professional* capacity (i.e., instructional, research, or principal administrative capacity) under certain conditions, but only if they have a contract or a reasonable assurance to perform service in any such professional capacity in the second such academic year or term. Similarly, clause (ii) of § 3304(a)(6)(A) provides that compensation may be denied "between terms" to employees of academic institutions (other than institutions of higher education) who perform services in a non-professional capacity (i.e., any capacity other than instructional, research, or principal administrative) under certain conditions, but only if they have a reasonable assurance to perform any such non-professional services in the second such academic year or term.

23(b) The NHUCL does not conform to the requirements of § 3304(a)(6)(A)(i) and (ii) for the reason that it denies benefits between school years when an employee of an educational institution performs service in a professional capacity in the first academic year or term or other period and has a contract or reasonable assurance to perform services in a non-professional capacity in the second academic year or term or other period, and vice versa. Clauses (i) and

(ii) limit application of the denials thereunder respectively to the performance of professional services in both academic years or terms and to the performance of nonprofessional services in both academic years or terms.

23(c) Further, the NHUCL does not conform to § 3304(a)(6)(A) of FUTA for the reason that clause (ii) of § 3304(a)(6)(A) authorizes, at the option of the State, the denial of benefits to non-professional employees of lower educational institutions only between successive academic years of terms. The NHUCL, in contrast, does not limit "between terms" denial of benefits to non-professional employees to the period between successive academic years to terms.

23(d) Still another reason why the NHUCL does not conform to § 3304(a)(6)(A) is that clause (ii) of § 3304(a)(6)(A) does not authorize "between terms" denial of benefits to non-professionals in institutions of higher education, whereas § 282:3,F of the NHUCL provides for a "between terms" denial to such persons.

23(e) Additionally, the NHUCL does not conform to the requirements of clause (iii) of § 3304(a)(6)(A) of FUTA since that section permits, at the option of a state, denial of benefits under certain specified conditions, on the basis of services described in clauses (i) and (ii), "for any week which commences during an established and customary vacation period or holiday recess. . ." The New Hampshire law, however, at § 282:3,F, provides for a denial of benefits "any other time" during which a school or other academic institution is not in session, between two successive academic years or terms or any other period," and is not, by its

terms, limited to periods specified in the federal law provision. Moreover, FUTA § 3304(a)(6)(A)(iii) does not apply to non-professional employees of institutions of higher education, whereas the New Hampshire provision does so apply.

Conclusions of Law on the Issues of Conformity

1. Pursuant to the provision of 26 U.S.C. 3304(c), the Secretary of Labor has provided the State of New Hampshire with an opportunity for hearing on the issues set out in the Notice of Hearing, dated June 15, 1978.

2. In relevant part, section 3304(a)(6)(A) of FUTA requires an approved State law, effective January 1, 1978, to provide that

> (6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law. . . .

2(a) Section 3309(a)(1) of FUTA, in relevant part, provides:

> (a) *State Law Requirements.*—For purposes of section 3304(a)(6)
>
> (1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are
>
> (B) Service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c). . .

Section 3306(c)(7) of FUTA provide:

> (7) Service performed in the employ of a State, or any political subdivision thereof, or any instru-

> mentality of any one or more of the foregoing which is wholly owned by one or more States of political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301.

2(b) The NHUCL has not been amended to provide this coverage effective on January 1, 1978.

2(c) Although the definition of "employing unit" in section 282:1,F of the NHUCL includes the state or any political subdivision or instrumentality thereof, sections 282:1, H(4)(g) and (q) of that law provide:

> (4) The term "employment" shall not include:
>
> (g) Service performed in the employ of any state other than this state or of any of the political subdivisions of such other state, or of any town, city or other political subdivision of this state unless such town, city or other political subdivision of this state elects to become subject under section 7 of this chapter; . . .
>
> (q) Service performed for this state by an individual who is not a classified employee in the state classified service; except that this provision shall not apply to service performed by an individual in the employ of a state hospital and/or an institution of higher education;

2(d) Since sections 282:1,H(4)(g) and (q) of the NHUCL exclude from the definition of "employment" service performed in the employ of (1) political subdivisions (absent an election of coverage pursuant to section 282:7), and (2) the State (if the individual is not

a classified employee in the State classified service) except with respect to services performed in the employ of a State hospital and/or an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon such person's annual earnings in "employment", it follows that the NHUCL does not provide the coverage of all the services required by § 3304(a)(6)(A) of FUTA.

3. Section 3304(a)(6)(A) of FUTA has been set out above. Section 3309(a)(1)(A) of FUTA provides:

> (a) *State Law Requirements.*—For purposes of section 3304(a)(6)—
>
> (1) except as otherwise provided in subsections (b) and (c), the service to which this paragraph applies are—
>
> (A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c).

3(a) Section 3306(c)(8) of FUTA provides:

> (8) Service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

3(b) Read together, these three sections of FUTA require a state to extend benefits, as of January 1, 1978, to employees of non-profit schools below the level of institutions of higher education under its State unemployment compensation law. The NHUCL has not been amended, effective January 1, 1978, to provide this coverage in that section 282:1,H(4)(s) thereof, provides:

> (4) The term "employment" shall not include:

(5) The following services performed in the employ of an organization described in section 501(c)(3) and except under section 501(a) of the Internal Revenue Code:

(3) in the employ of a school which is not an institution of higher education . . .

3(c) Since section 282:1,H(4)(s)(3) of the NHUCL expressly excludes from the definition of "employment" service performed in the employ of a school which is not an institution of higher education, and since an individual's entitlement to benefits under the NHUCL is based upon his annual earnings in "employment", the NHUCL has not been amended to provide the coverage of services required by §§ 3304(a)(6)(A) of FUTA.

4. Section 3304(a)(6)(B) of FUTA requires an approved State law, effective January 1, 1978, to provide that

(6)(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in Section 3309(a)(2);

4(a) Section 3309(a)(2) provides that for the purposes of section 3304(a)(6)—

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by state law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation at-

> tributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

4(b) These provisions clearly require that a State unemployment compensation law must (effective January 1, 1978), at the minimum, afford the governmental entities (which are required by sections 3304(a)(b)(A) to be covered by the State unemployment compensation law) the option of electing to pay contributions or make payments in lieu of contributions (i.e., reimbursements). The NHUCL has not been amended, effective January 1, 1978, to offer such choice to governmental entities. Section 282:6, A–2 of the NHUCL provides, in pertinent part:

> A–2. PAYMENT OF CONTRIBUTIONS BY TOWN, CITY OR OTHER POLITICAL SUBDIVISIONS
>
> Any town, city or other political subdivision of this state which has been elected under the provisions of subsection C of section 7 of this chapter to become subject to this chapter shall pay into the unemployment compensation fund an amount equivalent to the amount of benefits paid to claimants who during the applicable base period were paid wages by such town, city or other political subdivision . . .

4(c) Since the above quoted section applies only to political subdivisions electing coverage (as was required by section 3304(a)(12) prior to amendment by P.L. 94–566), no provision of the NHUCL provides the benefit financing options required by sections 3304(a)(6)(B) and 3309(a)(2) of FUTA.

5. Section 3304(a)(14) of FUTA requires an approved State law, effective January 1, 1978, to provide that:

> (14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing [*sic*] the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) of section 212(d)(5) of the Immigration and Nationality Act),
>
> (B) any data or information required of individuals applying for compensation to determine whether compensation is not payable to them because of their alien status shall be uniformly required from all applicants for compensation, and
>
> (C) in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

5(a) The NHUCL has not been amended to include provisions in conformity with the above quoted requirements of § 3304(a)(14)(B) and (C) of FUTA effective January 1, 1978, in the following respects.

5(b) The NHUCL does not expressly provide for the uniform collection from all applicants for compensation of any data or information required of individuals applying for compensation to determine whether com-

pensation is not payable to them because of their alien status as required by § 3304(a)(14)(B) of FUTA.

5(c) In addition, the NHUCL does not expressly provide that in the case of an individual whose application for compensation would otherwise be approved, no determination by the State agency that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence, as required by section 3304(a)(14)(C) of FUTA.

5(d) Section 3304(a)(9)(A) of FUTA required an approved State law, effective January 1, 1972, to provide that:

> (9)(A) compensation shall not [*sic*] denied or reduced to an individual solely because he files a claim in another State (or a contiguous country with which the United States has an agreement with respect to unemployment compensation) or because he resides in another State (or such a contiguous country) at the time he files a claim for unemployment compensation;

5(e) Section 282:1,N(1)(a) of the NHUCL provides that the term "wages" shall not include:

> (a) The amount of any payment to an alien unless said individual was, at the time he performed services, in the United States of America under color law.

5(f) Since there is no provision in the NHUCL which expressly provides that benefits will not be denied or reduced solely for the reasons specified in § 3304(a)(9)(A) of FUTA, and since it is unclear from § 282:1,N,(a) of the NHUCL whether or not the phrase "under color of law" is broad enough to encom-

pass individuals in a contiguous country with which the United States has an agreement with respect to unemployment compensation and who have been temporarily admitted into the United States for the purpose of performing services. I conclude that the NHUCL, effective January 1, 1978, has not been amended to contain a provision which meets the requirements of § 3304(a)(9)(A) of FUTA.

6. Section 3304(a)(13) of FUTA requires an approved State law, effective January 1, 1978, to provide that:

> (13) compensation shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sports seasons (or similar periods) if such individual performed such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the later of such seasons (or similar periods);

6(a) Section 282:1,O of the NHUCL, in pertinent part, provides that

> . . . Annual earnings shall be reduced by all wages for services in training preparation to participate or participation in sports or athletic events with respect to any weekly benefit amount for a week or (sic) total or partial unemployment during the period between successive sport seasons for any individual so engaged in the first of such seasons if there is a reasonable assurance of such performance in the second . . .

6(b) Section 282:1,O of the NHUCL is not in conformity with the requirements of § 3304(a)(13) of FUTA since the state law permits the use of non-sport wages with respect to a weekly benefit amount during the period between sport services even though the sport services constitute substantially all of the services performed by the individual during his base period. Section 3304(a)(13) requires that a State unemployment compensation law provide effective January 1, 1978, that under such circumstances compensation shall not be payable to such individual on the basis of any services.

7. Section 3304(a)(6)(A) of FUTA provides:

> (6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—
>
> (i) with respect to services in an instructional, research or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract of reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms,

(ii) with respect to services in any other capacity for an educational institution (other than an institution of higher education) to which section 3309(a)(1) applies, compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms.

(iii) with respect to any services described in clause (i) or (ii), compensation payable on the basis of such services may be denied to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess, . . .

7(a) With respect to the above-quoted FUTA § 3304(a)(6)(A) and clauses (i) and (ii) thereof, the NHUCL does not provide that benefits are payable on the basis of service in the employ of the State and its political subdivisions and nonprofit organizations, in the same amount, on the same terms, and subject to the same conditions as benefits are payable on the basis of other service subject to the State law, as required effective January 1, 1978. Clause (i) requires the denial of benefits "between terms" to employees of educational institutions who performed services in a professional capacity (i.e. instructional, research, or

principal administrative capacity) under certain conditions, but only if they have a contract or a reasonable assurance to perform service in any such professional capacity in the second such academic year or term. Similarly, clause (ii) provides that compensation may be denied "between terms" to employees of academic institutions (other than institutions) of higher education) [sic] who perform services in a non-professional capacity (i.e., any capacity other than instructional, research, or principal administrative) under certain conditions, but only if they have a reasonable assurance to perform any such non-professional services in the second such academic year or term.

7(b) The New Hampshire law denies benefits between school years when an employee of an educational institution performs service in a professional capacity in the first academic year or term or other period and has a contract or reasonable assurance to perform services in a non-professional capacity in the second academic year or term or other period, and vice versa. Clauses (i) and (ii) limit application of the denials thereunder respectively to the performance of professional services in both academic years or terms and to the performance of non-professional services in both academic years or terms.

7(c) Further, the NHUCL does not conform to § 3304(a)(6)(A) of FUTA for the reason that clause (ii) of § 3304(a)(6)(A) authorizes, at the option of the State the denial of benefits to non-professional employees of lower educational institutions only between successive academic years or terms. The NHUCL, in contrast, does not limit "between terms" denial of benefits to

non-professional employees to the period between successive academic years or terms.

7(d) Still another reason why the NHUCL does not conform to § 3304(a)(6)(A) is that clause (ii) of § 3304(a)(6)(A) does not authorize "between terms" denial of benefits to non-professionals in institutions of higher education, whereas § 282:3,F of the NHUCL provides for a "between terms" denial to such persons.

7(e) Clause (iii) of § 3304(a)(6)(A) of FUTA permits, at the option of a State, denial of benefits under certain specified conditions, on the basis of services described in clauses (i) and (ii), "for any week which commences during an established and customary vacation period or holiday recess . . ." The New Hampshire law, at § 282:3,F, provides for a denial of benefits "any other time during which a school or other academic institution is not in session, between two successive academic years or terms or any other period," and is not, by its terms, limited to periods specified in the Federal law provisions. Moreover, FUTA § 3304(a)(6)(A)(iii) does not apply to non-professional employees of institutions of higher education, whereas the New Hampshire provision does so apply.

8. NHDES contends that the federal statute is not phrased in absolute terms and that substantial compliance with federal law is sufficient to avoid withholding of certification. This argument is based on a misreading of the above statutory provision. Section 3304(c) of FUTA prohibits certification under either of two conditions: either the state law fails to contain certain required provisions or the state has failed to comply substantially with any such provision during the

prior 12-month period. The first condition required strict conformity between the state law and FUTA. Substantial compliance is relevant only to the second condition, which assumes the existence of conforming state law provisions and is aimed rather at their administration. The issues in this proceeding all involve the conformity of the state law to FUTA, not questions of administration. Therefore, the concept of "substantial compliance" is not at issue in this proceeding. Moreover, even if the concept of substantial compliance were at issue, the New Hampshire Unemployment Compensation Law is clearly not in substantial compliance with respect to any of the six conformity issues.

9. The New Hampshire Unemployment Compensation Law has a benefit year, which begins on April 1 and runs through the following March 31. Under New Hampshire law, unemployment compensation benefits during such a benefit year are based on wages earned during a "base period" defined as the immediate preceding calendar year. If New Hampshire had covered state and local government service on January 1, 1978, such service, standing alone, need not be usable to establish a valid claim until April 1, 1979.

9(a) NHDES has argued that this proceeding is premature because, due to New Hampshire's benefit year, no one in New Hampshire has yet been deprived of any benefit due to the state's failure to provide the extension of coverage provided for by the 1976 Amendments. However, section 3304(c) of FUTA required a certification determination by the Secretary by October 31, 1978, based upon whether or not New

Hampshire law contains the provisions required by FUTA at that time. Because the issues in this proceeding involve the content of the state law, rather than the manner of its administration, whether or not any New Hampshire claimant has yet been deprived of benefits is immaterial.

CONCLUSION

For the reasons set forth above, I find and conclude that the New Hampshire Unemployment Compensation Law is not in conformity with the requirements of FUTA with regard to each of the six conformity issues specified in the Notice of Hearing.

Findings of Fact on the Issues of Constitutionality

From the testimony of NHDES' witnesses who spoke from actual experience in the operation of and budgeting for units of State and local government, I find the following facts from the record before me:

1. From the testimony of Joseph Acorace, Finance Officer of the City of Manchester, N.H., I find:

(a) that the city employs approximately 2400 permanent employees, some 300 to 400 seasonal and/or part-time employees, and as many as 200 substitute teachers;

(b) that none of these employees are presently covered by any sort of unemployment compensation program;

(c) that although the City has long been able to elect voluntary unemployment insurance coverage for its employees under State law, its employees have never sought such coverage in the course of negotiation and collective bargaining;

(d) that the City eliminates [sic] permanent positions only by attrition, and in the nine years during which Mr. Acorace has worked for the City, there has never been a layoff of a permanent employee;

(e) that providing unemployment insurance coverage to the City's temporary and seasonal employees will therefore have the greatest cost impact on the City;

(f) that a large part of the City's current annual budget of $55.8 million is committed to the implementation of programs already mandated by the State and/or Federal governments, leaving discretionary flexibility over only approximately 15% of the City's annual budget;

(g) that there is in the City a climate of extreme taxpayer resistance to further property tax increases which makes it difficult for the Board of Mayor and Alderman to maintain existing programs and services;

(h) that the City operates a wide range of summer educational and recreational programs for its youth, and uses seasonal employees to staff these programs;

(i) that the City's Board of Mayor and Aldermen has passed a resolution opposing Federally mandated unemployment insurance coverage for the City's employees on the basis, *inter alia*, that such coverage would affect the ability of the Board to maintain existing programs and services and require costly new staffing and record keeping practices;

(2) From the testimony of Elizabeth Puddington, currently a consultant to the New Hampshire School Boards Association and past chairman of the Amherst School Board, I find:

(a) that over 86% of the funds used to finance public education at the local level is raised by the local property tax in New Hampshire, a State which has the sixth highest local property tax per capita in the country;

(b) that most of the policy decisions in final programming and the final amount of expenditures of local school districts in New Hampshire are made by the citizens at school district meetings;

(c) that local school boards in New Hampshire must prepare their school budgets for presentation to their local taxpayers almost 18 months in advance of implementation;

(d) that any proposal made by the elected local school district officials, any kind of changes in programming or policy in terms of personnel or otherwise, must be approved by the local voters;

(e) that local school districts in New Hampshire receive practically no aid from either the State or the Federal Government in terms of significant impact on local school district expense; New Hampshire ranks last in the Nation in State revenues to public education; the State ranks 44th in Federal aid to education;

(f) that local property taxpayers in New Hampshire are extremely aware of the money that they spend on their public schools; the school district budgets consume the highest proportion of the local property taxes paid by the citizens;

(g) that in New Hampshire the local school district budget is one budget that the local property taxpayers control and examine carefully by demanding to know where the tax dollars are spent;

(h) that almost with regularity the ways and means committees or citizens committees of the

local school districts, in reviewing proposed school budgets, recommend cuts in the school budgets;

(i) that there have been several instances within the last few years where budget cuts have been proposed for various local school districts in New Hampshire, for example

(1) the school district for the city of Berlin, with a $4 million budget, is facing a $600,000 proposed budget cut in response to taxpayer unrest in the City;

(2) the school district in the city of Laconia in 1976 suffered a $400,000 budget cut the day before notification was required for reemployment of staff; this reduction in the school budget required school district officials to inform all uncertified staff and most certified staff that they would not be guaranteed reemployment for the fall semester until there were sufficient revenues to fund their positions;

(j) that New Hampshire law requires that teachers be notified of reemployment or nonreemployment for the fall semester by March 15th; many school districts in the State do not hold their annual district meetings by March 15th and thus do not have a confirmed school budget to protect themselves in the event a cut in the budget is made; the standard procedure, then for these school districts is to notify their personnel that they will only be rehired if and when funds are available;

(k) that school districts in New Hampshire have a very small percentage of their individual school budgets over which they have actual control;

(l) that the State of New Hampshire has over 100 various laws that mandate that certain serv-

ices be provided by the local school districts; approximately 75% of the budgets of most school districts is used to meet the costs of providing these required services;

(m) that some of the steps that the local school districts in New Hampshire may have to take in order to meet any additional cost of unemployment compensation include:

(1) suspending the hiring of new staff;

(2) increasing the pupil-teacher ratios to preclude the hiring of new staff;

(3) reducing the support staff workforce (e.g. nurse's aids, secretaries, non-certified staff, non-essential personnel);

(4) reducing the amount of text books and supplies that are purchased;

(5) curtailing the athletic programs and other student activities of the school districts, despite their popularity with the community; and

(6) eliminating advanced-student instructional programs and elective subjects with low enrollments, with a consequent reduction in staff as well;

(n) that, in Ms. Puddington's experience as the chief negotiator for a New Hampshire school board, collective bargaining units of school personnel have never demanded, requested or even mentioned the payment of unemployment compensation as a part of a benefits package even though unemployment compensation was available to school personnel through the local government option coverage provisions presently in New Hampshire's unemployment compensation law;

3. From the testimony of Robert Herlihy, the Director of Merchandising and Accounts of the New Hampshire State Liquor Commission, charged with making all budget projections of revenues and costs for the Liquor Commission, I find:

(a) that the Commission presently employs 500 permanent employees and has a labor pool of 264 temporary and part time workers to operate 71 liquor stores in the State of New Hampshire;

(b) that the Commission, normally the top revenue-raising government agency in the State, raised 38.5 million in revenue for the State last year;

(c) that the Commission's annual payroll expenditure for temporary employees is $800,000;

(d) that the Commission's labor pool of temporary and part-time workers during the summer consists of college students, housewives, teachers, and people who are coming into the employment field looking for part-time work to finance their vacations;

(e) that the Commission's labor pool of temporary and part-time workers in the wintertime and during the Christmas season consists primarily of housewives and some high school students;

(f) that the Commission requires a labor pool of part-time workers because of the seasonal and even weekly fluctuation in the volume of the Commission's business, and that this system is cost-effective compared to the overstaffing during non-peak periods which would accompany exclusive use of permanent employees;

(g) that the layoff rate among permanent, classified employees of the Commission is less than 2%;

(h) that in computing the potential cost to the Commission of providing unemployment compensation benefits to its employees under the 1976 Amendments, Mr. Herlihy concentrated on the temporary, part-time workers employed by the Commission;

(i) that housewives and other temporary workers, who are typically employed as cashiers on a part-time basis by the Commission during high-volume weekend periods, can earn up to $1,800 a year with the Commission, which will place them over the $1,200 annual qualifying wage for unemployment compensation benefits and will permit them to seek unemployment benefits when they are not employed by the Commission;

(j) that the Commission will be liable for a portion of the costs of unemployment benefits paid to those temporary, part-time workers with the Commission who build up their wage credits, and thus the amount of unemployment compensation that they can receive, through employment at a second or subsequent job with another employer;

(k) that college students employed by the Commission during summer vacation can earn up to $2,000 from the Commission during the summertime, which will entitle them to collect unemployment compensation during subsequent vacation periods;

(l) that the cost to the Commission of providing unemployment compensation benefits to the employees of the Commission under the contributory tax methods of financing is likely to be $75–80,000 annually, with a potential cost under this financing method of $120,000 annually;

4. From the testimony of Danial Durgin, the Business Administrator for Supervisory Union 16 of Exe-

ter, New Hampshire, and President of the New Hampshire School Administrators' Association, I find:

(a) that, based on the contributory method of financing unemployment compensation benefits, the annual cost to the School District of Exeter of providing unemployment benefits to its school personnel under the 1976 Amendments will be over $32,000;

(b) that the local property tax impact of an additional $32,000 annual expenditure by the School District of Exeter is a tax rate increase of $.20–$.25;

(c) that under the reimbursement method of financing unemployment benefit costs, local school districts will also be liable on whole or in part for the cost of benefits paid to school personnel who voluntarily quit, obtain another job and subsequently become eligible for unemployment benefits;

(d) that in the last 9 or 10 years bargaining units for the school personnel in Supervisory Union 16 have never sought the payment of unemployment compensation benefits by the local school districts despite the existence of the local government optional coverage provisions under New Hampshire's present unemployment compensation law and the fact that the payment of unemployment benefits is a negotiable item in collective bargaining sessions with the school districts.

5. From the testimony of Walter F. Mead, the Assistant Commissioner of the Department of Public Works and Highways of the State of New Hampshire, I find:

(a) that the Highway Department of the State of New Hampshire is funded from a dedicated

highway fund into which highway user revenues (e.g. motor vehicle registration fees, drivers license fees and gasoline taxes) are deposited;

(b) that the mission of the Highway Department is to maintain the State system of 4,200 miles of highways, to construct and reconstruct the required mileage, to supplement that which is now there, both under the Federal aid highway program as well as State programs, and to administer and carry out certain aid programs for local towns for their 10,000 miles of road;

(c) that the Department of Public Works and Highways employs 1795 permanent classified workers;

(d) that between September 1977 and September 1978, the Department of Public Works and Highways employed 1340 part-time, seasonal and full-time temporary employees, including college students, who performed a variety of necessary functions for the Department (*e.g.* staffing of rest areas on highways, snow removal, construction, design and maintenance work);

(e) that in fiscal year 1978 the total payroll for all full-time temporary, seasonal and part-time workers employed by the highway section of the Department was $1.903 million;

6. From the affidavit of Arthur Fowler, the Comptroller of the State of New Hampshire, I find:

(a) that the State of New Hampshire employs approximately 2,200 temporary employees in various departments and agencies at the total annual payroll expenditure of $15,000,000;

(b) that the annual cost to the State of New Hampshire under the reimbursement method of

financing unemployment benefits could be as high as 4.3 million;

(c) that the annual cost to the State under the contributory tax method of financing unemployment benefits to these temporary employees will be approximately $300,000;

7. From the affidavit of Eldon R. Buswell, the Deputy Commissioner of the Department of Employment Security of the State of New Hampshire, I find that if unemployment compensation coverage is extended to the temporary and part-time employees employed by this Department, the additional administrative costs to the Department will range from $75,000 to $150,000 annually.

8. From the affidavit of Robert E. Whalen, the Commissioner of Health and Welfare for the State of New Hampshire, I find that the Department presently employs approximately 500 temporary employees and that approximately 34 employees per year will be eligible for unemployment compensation benefits at an annual cost of $30,528 under the challenged provisions of the 1976 Amendments.

9. From the affiadvit of Charles Barry, the Director of the New Hampshire Fish and Game Department, I find that providing unemployment compensation benefits to the temporary workers employed by the Department under the challenged provisions of the 1976 Amendments will require an annual expenditure by the Department of $4,830 for fiscal years 1978 and 1979.

10. Under the challenged provisions of the 1976 Amendments, every proposal to establish new or ex-

pand existing government programs and services of New Hampshire and its local governments will have to consider as one aspect of any such program or expansion the potential cost of unemployment compensation benefits that a new or expanded government service or program will create for the State or its local governments.

11. Both parties introduced expert testimony on what they perceive to be the additional cost to New Hampshire as a result of the 1976 Amendments for FY 78, 79 and 80.

12. Mr. Lennox L. Moak, a consultant to Blyth, Eastman Dillon Co. and other institutions testified on behalf of New Hampshire. Mr. Moak was Director of Finance for the City of Philadelphia in 1952, 1954 and again from 1972 to 1977. He holds a bachelor's degree in Mathematics from Southwest Texas Teachers College and a master's degree in Governmental Administration from the University of Texas. Mr. Moak has written or supervised about 500 reports over the past 40 years. He has also authored six books in the field of public finance dealing with budgeting, capital programming, sales tax administration, debt administration and general local government finance.

13. Mr. Moak testified that he was generally familiar with the Federal-State Unemployment Compensation Program, although he was not an expert in unemployment compensation. To prepare his testimony, Mr. Moak visited New Hampshire for three days to gather financial and statistical data. From this data, he prepared a paper (New Hampshire Ex. D) in which he described what he believed to be the "indicated" addi-

tional costs should unemployment insurance coverage be expanded in New Hampshire in accordance with the 1976 Amendments.

14. The Department of Labor also provided expert testimony on the cost issue from Dr. James D. Van Erden. Dr. Van Erden is currently employed by the U.S. Department of Labor Employment and Training Administration, Unemployment Insurance Service Division, Actuarial Services, as a supervisory Actuary.

15. Dr. Van Erden holds a bachelor's degree in Economics from Weber State College, and a master's degree in Applied Statistics and a Ph.D. in Economics from the University of Utah. He has authored several publications in the field of Economics, statistics and cost forecasting of unemployment insurance.

16. His current duties include forecasting costs of unemployment insurance programs for the Department of Labor and Congress as well as other groups interested in the cost of unemployment insurance programs. Based on statistical data available to him in the course of his employment, Dr. Van Erden also made a cost projection for New Hampshire should the 1976 Amendments be implemented. (DOL Ex. 21).

17. Based upon my review of the documentary evidence and opinions offered by these experts, I find and conclude that the projections and estimates of Dr. Van Erdern are to be accorded the greater weight. Based upon his opinion, I find:

a. Additional covered employment (CE) which would result from the extension of unemployment compensation coverage to all New Hampshire

state and local government employees has been estimated as follows:

FY 1978	35,148
FY 1979	37,609
FY 1980	40,421

b. The average weekly benefit amount (AWBA) payable to newly covered New Hampshire state and local government employees has been estimated as follows:

FY 1978	$66.38
FY 1979	71.03
FY 1980	76.00

c. The insured unemployment rate (IUR) for a specified period is defined as the number of individuals filing claims divided by covered employment. In New Hampshire, the IUR for the regular private sector program has dropped significantly in recent years, following a nationwide pattern of economic recovery from the 1975 recession. The actual data is as follows:

CY 1975	7.5%
CY 1976	3.3%
CY 1977	2.2%

(d) The New Hampshire IUR for the second calendar quarter of 1978 was 1.05%.

(e) Based on the IUR described in paragraph 17(c) and generally accepted economic projections for the next three years, the New Hampshire IUR for those years has been estimated as follows:

FY 1978	1.1%
FY 1979	1.0%
FY 1980	1.0%

(f) Because the IUR includes all claims, not just those on which compensation is paid, it should be multiplied by .8, the historical ratio between weeks compensated and weeks claimed.

(g) Historically the uninsured unemployment rate for state and local government employees has been significantly lower than that for the regular (private sector) UI program. Nationwide, the ratio between the IUR for covered state and local employees and the IUR for the regular program has averaged .26 over the past several years.

(h) Multiplying the above factors yields the following USDOL estimates of the cost of the extension of coverage to New Hampshire state and local government employees:

	FY 1978	FY 1979	FY 1980
Additional CE	$35,148	$37,609	$40,241
IUR	1.1%	1.0%	1.0%
weeks/year	52	52	52
weeks comp/ weeks claimed	.8	.8	.8
S&L IUR/IUR	.26	.26	.26
AWBA	66.38	71.03	76.00
Total Cost Estimate	$227,585	$288,935	$330,787

(i) Considering the transitional provisions of the 1976 Amendments, the best estimate of actual costs to New Hampshire for the extension of coverage to state and local government employees is the following:

FY 1978	$ 0
FY 1979	144,468
FY 1980	330,787

Recommendation

Based upon the foregoing findings of fact and conclusions of law, it is recommended that the Secretary of Labor determine that, the state of New Hampshire

has failed to amend its Unemployment Compensation Law: (1) so that it contains, effective January 1, 1978, each of the provisions required to be contained therein by reason of the enactment of the Unemployment Compensation Amendments of 1976 (Public Law 95-566, approved October 20, 1976; 90 Stat. 2667, *et seq.*) and Title III of the Emergency Unemployment Compensation Extension Act of 1977 (Public Law 95-19, approved April 12, 1977, 91 Stat. 39, 43, *et seq.*); and (2) so that it no longer contains the provisions specified in section 3304(a) of the Internal Revenue Code of 1954, 26 U.S.C. 3304(a) as more fully described herein.

/s/_____

ROBERT G. MAHONY
Administrative Law Judge

Dated: October 13, 1978
Washington, D.C.

RGM:jps

SERVICE SHEET

State of New Hampshire
Conformity Case

Copies of the foregoing RECOMMENDED DECISION were sent to the parties listed this day OCT 13, 1978.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

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/s/_____
CAROL J. READY

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE COURT OF APPEALS FOR THE FIRST CIRCUIT

U.S. COURT OF APPEALS
FILED IN CLERK'S OFFICE
May 21, 1980

FOR THE FIRST CIRCUIT
Civil Action
No. 78-1564

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY,
AND THE STATE OF NEW HAMPSHIRE,

Appellants

v.

THE HONORABLE E. RAY MARSHALL,
SECRETARY OF LABOR OF THE UNITED
STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The State of New Hampshire, Department of Employment Security; and The State of New Hampshire, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action of Febuary 20, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254.

THE STATE OF NEW HAMPSHIRE
GREGORY H. SMITH, ACTING
ATTORNEY GENERAL, BY
JAMES E. MORRIS,
ASSISTANT ATTORNEY GENERAL

/s/_____
JAMES E. MORRIS, ESQUIRE

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EMPLOYMENT SECURITY
EDWARD F. SMITH
GENERAL COUNSEL

/s/_____
EDWARD F. SMITH, ESQUIRE

APPENDIX E

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Dana H. Gallup
Clerk

1606 John W. McCormack
Post Office and Courthouse
Boston, Mass. 02109
(617) 223-2888

July 10, 1980

Michael Rodak, Jr., Esquire
Clerk, Supreme Court of the
United States
Supreme Court Building
Washington, D.C. 20543

Re: No. 78-1564. State of N.H. Dept. of Employment Security, et al. v. F. Ray Marshall, Secy. of Labor, Etc.

Dear Mr. Rodak:

On May 21, 1980, I sent to you a document which purported to be a notice of appeal. Through error on our part, the notice of appeal was erroneously stamped May 21, 1980. The notice of appeal was, in fact, filed in our office on May 20, 1980, and should have been stamped with that date.

I would appreciate it if you would correct our stamped date in order that it may reflect the true filing date.

Would you kindly acknowledge receipt of the above on the enclosed copy of this letter.

Very truly yours,
DANA H. GALLUP, CLERK.
By: /s/ _____
FRANCIS P. SCIGLIANO
Chief Deputy Clerk

FPS: lam

---

cc: James E. Morris, Esquire, Office of the Attorney General, Concord, N.H. 03301
Charles S. Rhyne, Esquire, Rhyne & Rhyne, 100 Connecticut Ave., N.W. Suite 800, Washington, D.C. 20036
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